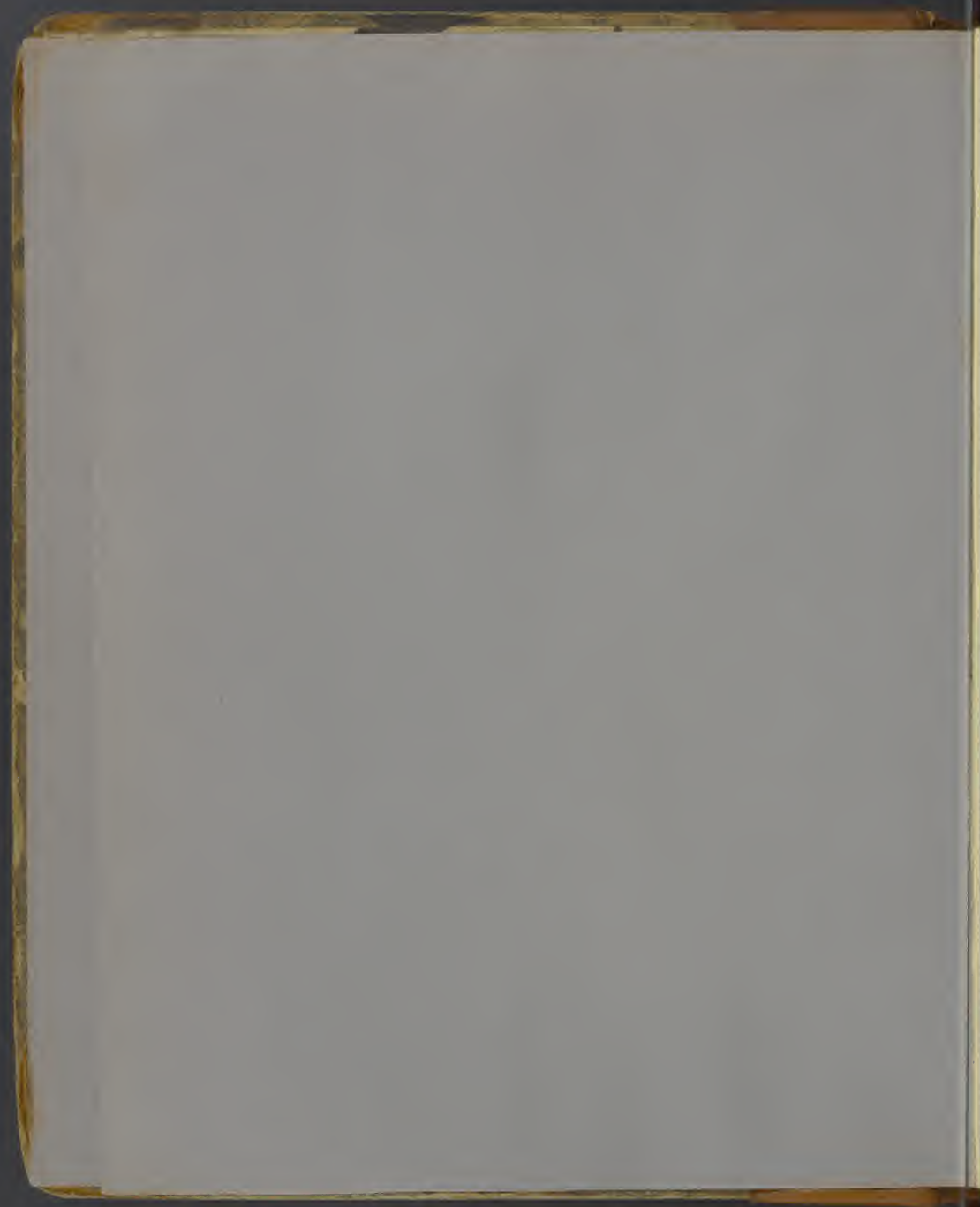
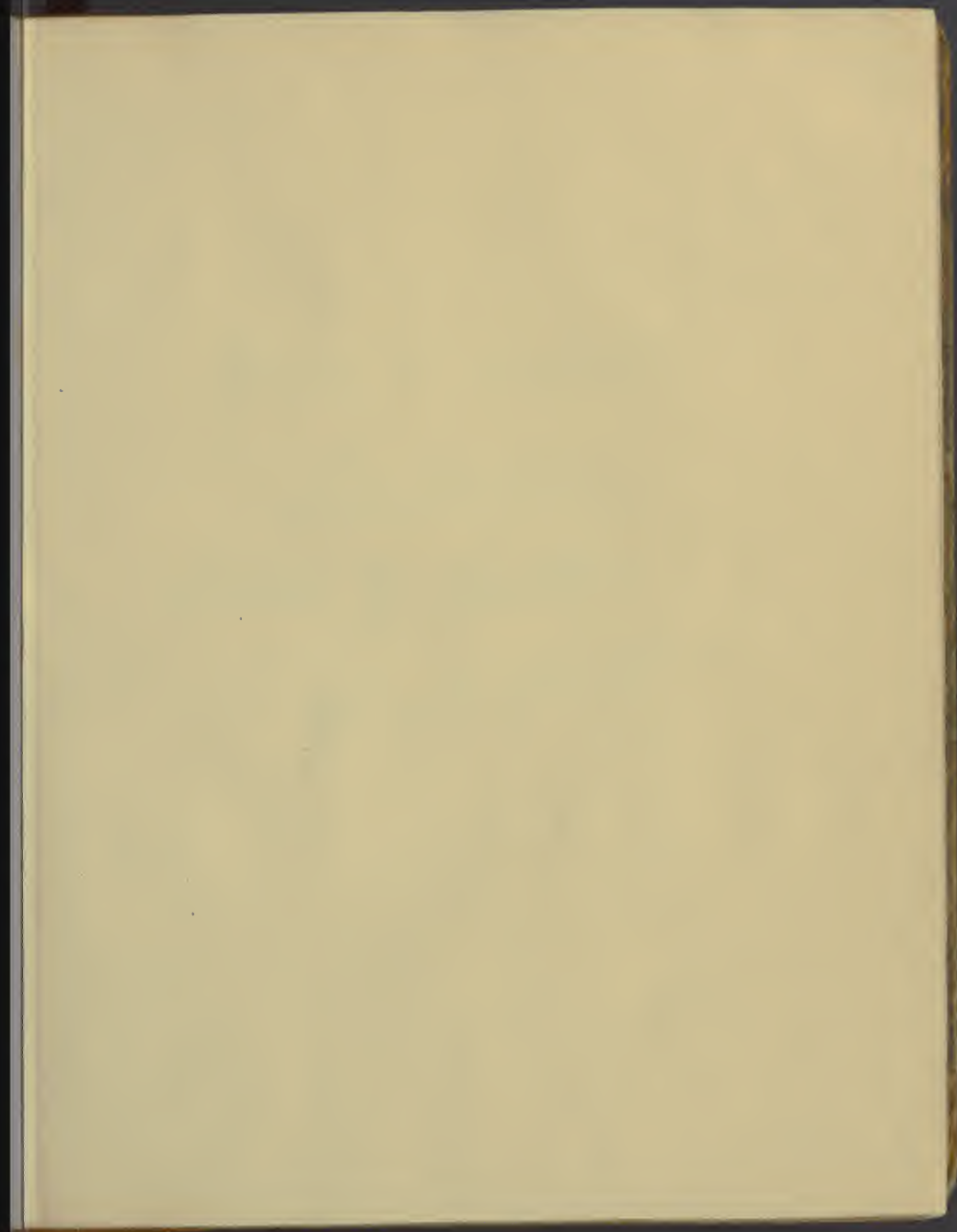
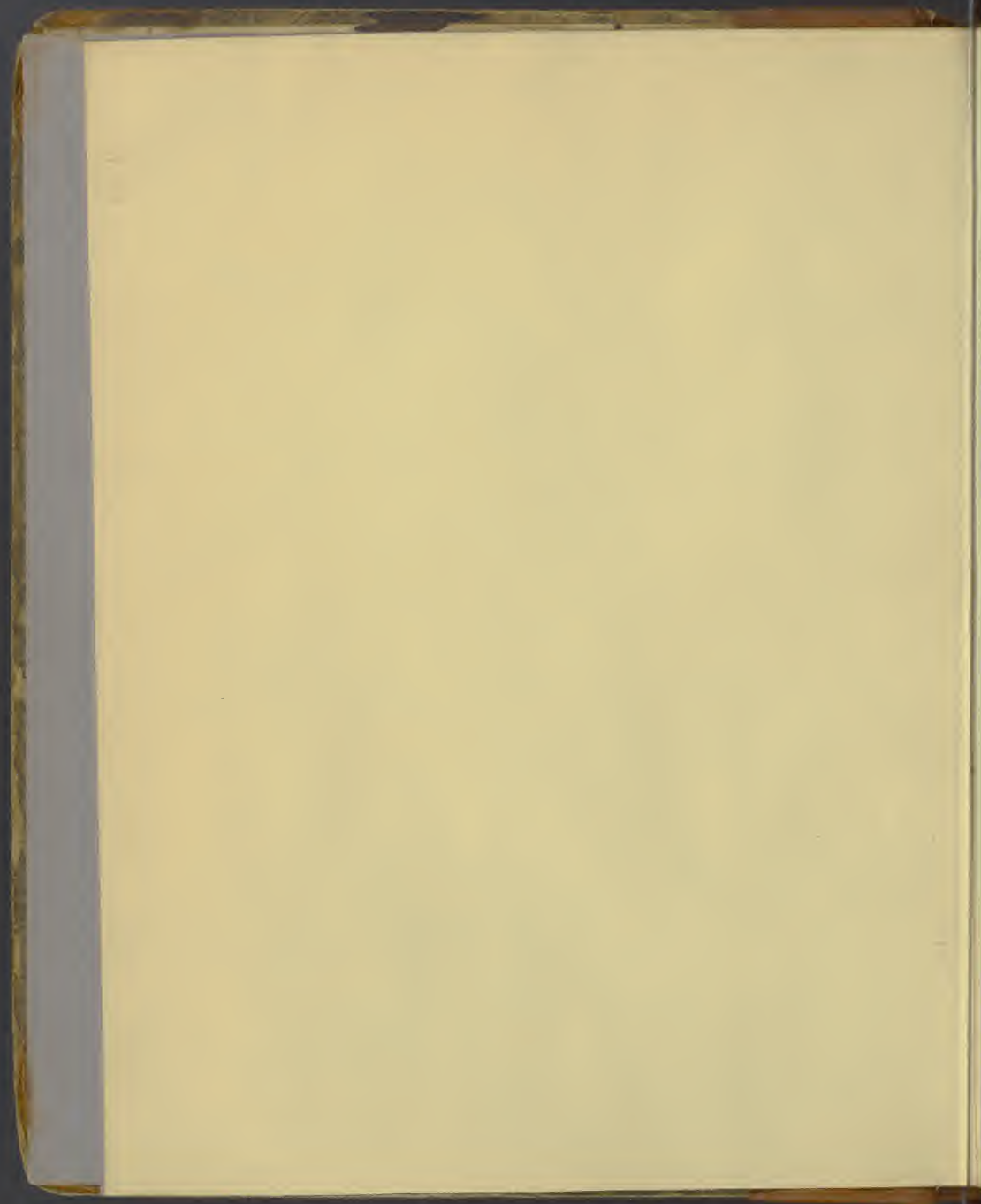


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S.H.



Revere & Gould's
Lectures.

Revere & Gould's
Vol. 6th Lectures
E

Wm. A. Smith

1841

Wm. A. Smith

1841

Criminal Law.

Lecture 1st



4 Bl. 5-
2 Swift 291-

A crime is an ^{act} committed or omitted, in violation of the Law of the Land, forbidding or commanding it. It is an injury done to the public.

In crimes where Life is concerned, they are called "capital crimes." Smaller faults & omissions of less consequence are called misdemeanors.

At Common Law, public & private actions are totally distinct; & when united, it is done by a Statute. This union is the foundation of those actions which are called qui tam actions, in which the individual who has suffered the injury, or some common informer, brings the action, as well in the name of the public as in his own name; & here the public prosecutor cannot bring an action for the same offence, unless the individual withdraws his, on the principle that a man shall not be punished twice for the same offence.

3 Bl. 160-

Criminal Law.

4th. 2.

The public by its officers are the proper prosecutors. In England criminal prosecutions are brought in the name of the King - In Connecticut in the name of the State: & in the United States in the name of the Government.

4th. 6-

There are many crimes which are injuries both to individuals & to the public - In these cases the individual may have his action for damages, the public theirs for the violation of the Law - And here the rule of Evidence is, that the proof obtained in the civil action by the individual, is not Evidence in a public prosecution.

It will be remarked that it was no more or less a crime, because the individual does or does not suffer by it - The violation of the Law here constitutes its delinquency.

There are several crimes where the informer has the whole penalty - In these cases, the form of the action is civil not criminal. It is a crime in effect, but civil in dress. It is in the nature of an action of Debt, the person committing the crime, is supposed to owe the informer a penalty.

Criminal Law.

3

1 Bl. 1

In England, the person who suffers an injury of felony cannot bring an action to recover damages. The reason given for it is that, the private wrong is merged or swallowed up in the public wrong - but this reason is insufficient. What cause exists in the nature of things, why the individual sufferer should not be compensated for the injury sustained, if the felon has property to remunerate him? There is none. The true reason then is, that in England no man can commit a felony without a forfeiture of his life & property. The sufferer cannot obtain any thing even if he should recover in an action for his body is on the gallows & his property forfeited to the King. But here the reason of the Law ceases; Felony in England is not always felony here. It does not here occasion forfeiture of property. It is then highly reasonable that the individual should have his action & recover damages.

1 Bl. 54.

57

Crimes, are of two sorts - Those which are called mala in se, & those which are mala prohibita. The former is the commission of an act which the conscience of a person tells him is wrong.

Criminal Law:

They are punishable at the Common Law. The latter are also punishable at Common Law, & by Statute.

The Statute punishment accumulates, the Common Law punishment. Unless the former takes away the Common Law remedy, it remains as it was, & there is no necessity of prosecuting under the Statute.

Sometimes the Statute tells what the Common Law is & then it is said to be declaratory of the Common Law. If the Statute lessens the punishment, it takes away the Common Law punishment, & the public prosecutor is not left at his option, whether to prosecute at Common Law, or on the Statute.

Penal Statutes receive strict construction.

In England, to steal horses is a felony; it was therefore by him who had stole one only, that his conduct was not criminal by the Statute. This ^{was} going much too far - yet it is proper when a balance is made that judges & juries should lean on the side of acquittal rather than that of punishment.

To constitute a crime, it is necessary that there should be a viicious will, & a viicious act consequent

on such will. If the act is not committed, however wrong, in foro conscientiae, the intention may be, it is not a legal crime. Here the Law of his conscience reaches him, & no other. Neither is it a crime, if the act committed be unintentional.

11th. 26

But to this rule, there is one exception. That, ^{Drunkenness}
Here it is evident that for a time, the man has no will, but, motives of policy require that he should be punished as tho he had. It is a matter of necessity that his Drunkenness should not excuse him.

But what is to be done when a Statute is made forbidding certain actions to be committed, & no penalty is annexed for the violation of it? -
Answer - The person may be prosecuted at Common Law for a breach of the Statute - That comes in to aid & assist it. This is the principle. If no penalty is annexed, his wrong is no less - He has violated a Statute, which he had no right to do, & the Common Law will punish him for this violation. The degree of punishment is optional with the Court.

Criminal Law.

There are but few of the Criminal Statutes of England, used in this Country. but there are some so general, that they have been adopted by every State in the Union. In these instances they are generally copied verbatim from the English Statutes. Many of them have had constructions put upon them by their Courts. & the rule is, that when they are copied & have had constructions put upon them, our Courts are bound by their constructions; because the Legislature when they adopted them, thought their construction was proper & reasonable. They cannot depart from it, any more than tho they were told so in detail.

But of a man who is totally deceived into intoxication - Duare - ought he to be viewed in the same light as a Lunatic?

Criminal Law.

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Lecture, 2^d

1 Bl. 26-

27-

It is a general principle that when a man commits an act thro accident which were it not for the case of accident, would be criminal he is not culpable. This must be understood, however with some qualification - If the man does the act in pursuit of his lawful business; as if he should be hunting for deer, & by accident kill a man he is not criminal; but if he is in pursuit of any thing unlawful & yet, unintentionally kills another it is a crime.

1 Bl. 26. 39-

Persons may therefore be criminal to a certain extent, even tho they have no intention to commit a crime. In these cases there is a culpable negligence which affords guilt to an action.

This distinction runs thro all the cases.

Heaton. C. L.

4 Bl. 264

3^d A man is privileged from the imputation of criminality when he does an action thro mistake, which, if it were not for the mistake would be criminal: as when a physician has entered on

Criminal Law

House & the owner in attempting to kill him unintentionally kills one of his own family. This however does not extend to mistakes of Law as Outlawry &c —

L. Pl. 25.

4th. A man is also privileged in certain cases on the ground of compulsion, where in others the action would be criminal. This is the case with soldiers in every unjust war — called upon by their government to fight they must obey — But in no instance whatever is the compulsion of a superior over an inferior an excuse for the crime committed by the latter: not of a servant by the master, except in the case of a wife — & the extent of her excuse is bound by the two following rules.

L. Pl. 28 —

1 Hale Pl. 45.

1 For every invasion of the rights of property which she makes by the coercion & command amounts to 1/2 of her husband she is excusable; &

2 — when she transgresses any Law of Society which is merely a creature of society, except Treason, if done by the coercion of her husband, she is excusable.

Criminal Law.

9-

4 Bl. 29 -
1 Hal. P. C. 47.

If he is guilty of crimes which are made
in se, the se is unavoidable, for force by coercion.

4 Bl. 29
1 Hal. P. C. 23.

A wife may also be indicted with her husband
for keeping a brothel. In those cases where the
wife is excusable thro coercion, the husband is
liable to suffer the penalty annexed to the crime.

4 Bl. 23 -
1 Hal. P. C. 24.

5. Minors or infants are privileged in some
instances for the commission of actions which
would be criminal in others. By the Common
Law, minors under seven years of age are not capable
of committing crimes. Between seven & fourteen,
if a hether they were capaces deli is admissible.
After the age of fourteen, they are of full age to commit crimes.

Pro. Lesh. 113. 114.
35. 36. 37. 133.

1 Hal. P. C. 613. 615.

8 Reports 159.

1 Bl. 34

York. 137.

Of Principals & Accessories - There are
two crimes in which there can be no accessories.
The highest & the lowest - Treason & Trespass - neither
can there be in manslaughter.

A Principal is one who does the act or
who is present aiding & abetting it.

It is not necessary that the person should be actually

Criminal Law

11 Bl 34-

Foster 350-

in view, to constitute him a Principal. If he is at a distance keeping watch for the purpose of giving notice, when there is danger of being observed, he is a principal.

11 Bl 66 6/5-
6/6

An Accessory is one who is not present, but in some manner concerned in the act, he may be an accessory before or after the fact. He is one before the fact, when he counsels, advises &c, & is liable for all the consequences which follow from the commission of the act, but he is not answerable for a totally distinct crime.

4 Bl 37-

11 Bl 66 6/5-

An accessory after the fact is one who aids, assists, feeds, clothes &c any person guilty of a crime.

4 Bl 37-8-

11 Bl 66 6/5-

This is true only when he aids, assists &c the criminal so that he may escape the hands of justice.

11 Bl 35-

39-

2 Hawk 320-

This rule is as extensive as it possibly can be, except in the case of Wives & they are privileged. A Father is an accessory to a crime when he assists his son in fleeing from justice. But a wife may secrete, feed &c her husband guilty of a

Criminal Law

11-

1 Hal P.C. 621.

Criminal action, & yet is not considered by the Law guilty as an accessory —

The punishment inflicted on accessories before the fact, is different from that inflicted after the fact —

Lecture 3

Arson

Arson is the malicious willful burning of the house or outhouses of another.

1 There must be an actual burning —
To constitute this crime it makes ^{no} difference how small the burning is; if it only defaces the boards, it is Arson —

2 It must be burning the house or outhouse of another. — By outhouses are meant barns, which are empty, if near the mansion house, & those at a distance if filled with hay, grain &c — stacks of hay, grain &c — If they are at a distance & not filled with hay &c — it is not Arson — But a high misdemeanor — In Connecticut burning stores shops &c the like that have merchandise

Criminal Law.

1 Bl 221-

1 Hawk Ch. 105.

See too 377.

in this is arson. If a man burns his own house, & by that means burns another, it is Arson.

But if it only exposes & does not burn his neighbour it is a misdemeanor. If a man burns his own house which he has leased it is arson.

3 The burning must be done with malice. We generally mean by malice ill will, but this is not the legal sense of the term, because a man may do an action thro' malice, & not thro' ill will. He may burn the house of his neighbour for the purpose of plundering him of his money & yet have no ill will towards him. In Law then it is thus understood viz. When a person does an act from a wicked motive, he does it with malice. If the motive is a vile one, if he shows an entire want of social feeling, (as is the case in one species of negligence) malice is presumable, & that always.

4 It must be a willful burning; by this is meant that there must be an intention to burn.

Criminal Law.

13.

In Connecticut by Statute a man cannot be punished

By the Common Law Arson is punished with death without benefit of Clergy. By benefit of Clergy, is meant nothing more, than that any person when convicted of a capital offence, the first time might make the plea incompetent by Statute he is dismissed, his being hanged on the same, but for a second offence should suffer the penalty annexed to the crime. The Law of the United States do not recognise any such privilege -

In Connecticut, Arson by a burnt life is punished, is punished with death. Other kinds of Arson are punished by imprisonment in a penitentiary. Circumstances must determine whether there was an intention to expose the lives of persons -

Criminal Law.

Burglary

1. Litt. 63.

Burglary (as defined by Coke) is when a man by night breaks & enters the mansion house of another with an intent to commit a felony.

This definition is not sufficiently loose. To break open a house of public worship with a felonious intent is Burglary. So to break down the walls of a town. To be complete it should have been "When a man in the night season breaks & enters a mansion house, a house of worship, or walls of a city, with intent to commit a felony."

11 Bl. 224.

1 Hawk. 181.

1 Hale's P.C. 580.

2 Inst. 63.

1. To constitute the crime it must be done in the night season. By night season is here meant, when there is not sufficient daylight to discern a man's face. If there is crepusculum or daylight enough to see his face it is not Burglary.

Co. Litt. 64

1 Hawk. 103.

2. As to the place. It must be a mansion house. In this term is included all houses within the curtilage i.e. barns, woodhouses, coach houses, chambers, &c. for baggage.

Burglary.

15-

1 Foster 77-

1 Heat. P. 6. 566-

588. 556. Foster 30. 39

4 Pl. 224. 225-

It makes no difference how inconsiderable the property if there is a disturbance. The main object of the Law is to protect the tranquillity which every one wishes to enjoy in the hours of Sleep.

3 There must be a breaking: If a house is shut up, however it be opened, it is a breaking - as if a window be lifted up, a door unlatched &c. If a door is open & a person enters & breaks an inner door, he is a burglar. So if he comes down a chimney, he is a burglar. So where a fraudulent pretence is made use of, to enter a house is burglary as knocking at a door, procuring a Constable to break the door & then binding the constable. If the person is lodging in the house, & in the night breaks another door, with intent &c. it is burglary. So if a man gets into a house in the day time & breaks out in the night it is burglary.

1 Hawk. 102. 103.

1 Heat. P. 6. 551.

552.

553.

4 Pl. 226-

4. There must be an entry. Any, the least part of the man's body, his hand, or with an instrument held in his hand is a Burglacious entry.

1 Heat. P. 6. 555-

1 Hawk. 103

Foster 108-

4 Pl. 227

Burglary

1 Bl. 227.

5. There must be an intent to Commit a Felony. It is not necessary that the act should be committed. It must be intended. This intention must be determined from the circumstances attending the fact. The presumption is however in this case, always against the criminal & the whole burden of the proof, that he had no felonious intent lies on him -

Lecture 4th

4 Bl. 223

What is Felony? In England, it is a Crime which occasions a forfeiture of Goods & chattels & lands

4 Bl. 180. 181

Here it is such a crime as would in England occasion those forfeitures. In England it is by the Common Law punished with Death & by Statute the curfew of the benefit of Clergy - In Connecticut it is punished by Confinement in Newgate. It may in this place be noted that a person may in some cases resist a Burglar & if he kills him shall be justified - The general principle is that when a man is attempting

Burglary

17-

to commit a crime with violence, which, if committed would be punishable at common Law, with Death, resistance unto Death is lawful. The attempt must however be attended with force. The intention of the Law is to prevent injuries & therefore a man may in some cases kill his assailant if he is in danger of great bodily harm, altho there was no intent to commit a felony. This killing however must be necessary.

4 Pl. 180. 181.

Larceny

Larceny includes Theft & Robbery. In the English Law, it is subdivided into grand larceny which is the stealing of goods over the value of twelve pence; & petit larceny stealing under the value of twelve pence.

4 Pl. 229-

"Theft is the felonious taking & carrying away the goods of another man". This is the same Law.

4 Pl. 230-

Larceny

as it is in England. It differs only in the punishment.
 1 To constitute this crime, there must be a taking.
 The property must not be in his possession, else
 it is not a felonious taking. If property is delivered
 to another in trust & he breaks that trust by carrying
 away the goods, it is not theft, because he has
 them in possession. But if a carrier who is
 entrusted with a bale of goods, breaks it open
 & takes enough to make him a coat & deliver
 the rest, it is theft. The reason appears to be,
 he never has possession of a part, nominally only
 of the whole - If a person has the use of a thing
 & converts it, it is, ^{not} theft. The guiltment however
 must be lawful. If the article is procured by force
 & then converted it is theft. Yet the intention must
 have come into his mind, before the article has
 delivered, to make it theft. If it came afterwards ^{not} it is not theft.

11th 231- I "A Carrying away." - any removal whatever,
 3 Inst. 108-7- from the place where the property was situated, is a felonious
 1 Hawk. 93. taking away - There is however this exception -

Larceny

19

A Thief was taking a piece of plate from the floor as it lay horizontally. Article white & even on the floor but perpendicular. This was not considered a felonious taking away.

1 Hal P.C. 509.

1 Hal P.C. 232 -
233 -

1 Hal P.C. 510 -

3 It must be felonious. Being taken & carried away is generally evidence of felonious intent. Not taking privately does not always evince animus furandi - A felonious intent of course excludes every thing which comes under the denomination of Trespass - & It must be personal property. Thus suppose a man hacks cut down a number of trees & carry them immediately to a saw mill. That he steals &c. &c. - Suppose he has carried them away sometime after they have been cut down by the owner, would this be theft? It would - & so if they had been cut down by the owner. If any thing adheres to the freehold, & is taken immediately it is a Trespass. If he has it for a time, & then take it away, it is Larceny.

1 Hal P.C. 234 -

To take Books, note, & writings evidence of Self is not felony upon principle of the Common Law.

LARCENY

To steal a Bank-bill, is felony by Statute.
 But I think it is by Common Law, because it
 is money. This however was never decided except
 by a County Court in the State of Connecticut. They
 determined it not to be theft: a Statute of theirs since
 declares it to be theft.

5. It must be the goods of another. But under
 certain circumstances a man may be guilty of
 theft, by taking his own goods: as if he pawns
 his watch, & then takes it from the pawn-broker.
 Here the general principle operates. His watch is
 not in his possession.

If property is stolen, & the owner is not known,
 it is Larceny.

Lecture 5th

There is one species of property which cannot be
 the subject of Theft. It is those animals which are
 called Fera natura. But if they are of use for
 food & labour, it is Larceny to steal them. And, tho
 those that are not of this use, are not subject to theft, yet

Larceny. Robbery

an action of Trespass will lie for the recovery of damages if taken away.

In England theft above the value of twelve pence is by the Common Law punished with death; under this sum with whipping &c.

In Connecticut punished by whipping, except House stealing which is punished with imprisonment.

By statute in England, stealing from houses is made more penal, than stealing from persons, by being excluded from the benefit of Clergy - The Common Law places them on the same footing.

Robbery

Robbery is the felonious forcibly taking from the person of another, goods or money, of any value, by violence, or a previous putting him in fear. The word felonious is immaterial, because the forcible taking &c is a Felony.

1. There must be a taking. Any attempt however forcible is not Robbery, but by Common Law a High

Robbery.

1 Hal P. 533 -

misdeemeanor. In Connecticut Counts may furnish for the attempt, precisely as tho the act has been committed -

1st Hawk. 96.

2. It must be a previous putting in fear. But if two men are riding on the highway & one knocks the other down, & rifles his pockets, it is a Robbery -

3 It must be a forcible taking. But there are exceptions. If a beggar with a pistol in his hand, asks Charity, & money is given him, it is Robbery -

4 Hal 242

1 Hal P. 534

If a farm with an instrument of death in his hand says, "you must purchase my watch, & the price is \$200" - If you take the watch & deliver the money it is Robbery. - It would be better however to say the person must be put in fear of force -

Foster 128 -

4 It is from the person of another - It may be in his presence. As where a Robber by menaces & violence, puts a man in fear & drives away his sheep & cattle before his face. It is not necessary therefore that the man should consent to the Robbery.

Robbery - Perjury

4th 243-

There is an offence in England called malicious mischief - Here it is nothing but Trespass at Common Law - In England it is punished with death without benefit of Clergy - Here with imprisonment.

Perjury

4th. 137-

Co Litt. 164.

Perjury is when a lawful oath is administered in some judicial proceeding, & the person swears wilfully, absolutely & falsely in a point material to the issue -

1. It must be a lawful oath - That is, it must be administered by some person having power to do it.
2. It must be administered according to the Law of the Land - In this state the Law is to be held up (a custom derived from Holland) -

3. In some judicial proceeding - to person has a right to administer an extra-judicial oath - But a man may perjure himself, before arbitrators.

4. He must swear wilfully, absolutely & falsely, i.e. he must have an intention to swear falsely -

Perjury

He must swear the fact is so - & he must swear
sincerely - He may be convicted of perjury even
when he swears the truth, if he did not know it
to be true -

5 In a joint material. But if it is not
material, & he thought it was, it is Perjury -

Lecture 6th

Subornation of Perjury, is the procuring
another to take such an unlawful oath as constitutes
perjury in the principal, & it is punished in the same
manner with perjury which by the common Law is
imprisonment & sitting in the stocks, pillory &c.

A conviction of this crime disqualifies a man
to be a witness in any case before a Court of justice -
It is a part of the judgment, & a bailor will not
make him qualify - But Perjury by the Statute
as to it causes this disqualification, if perjury, restores
the credit of the person & makes him a competent
witness -

11 Bl 137

4 Bl 137 -

3 Inst 163 -

10 Inst 349 -

talk 649 -

Sumner's Digest

Evidence
1st

Subornation of Perjury

25

4 Bl. 88 -

134 -

156 -

245 -

Morgan's Essay -
259 -

The crimen falsi is such a crime as shows the person guilty of it, to be destitute of all principle of honesty & integrity - But to exclude his evidence you must produce in Court a record of the Perjury.

4 Bl. 138 -

When a person is convicted of a Capital offence & suffers death, by reason of the falsehood of another, the person taking it, is indictable for murder - But if he is not convicted it is only a high misdemeanor -

Forgery

"Forgery at the Common Law is the fraudulently & falsely making or altering any record, or any other paper of an authentic nature, or Deed or will"

Moon 655 -
759 -

Every thing has been deemed a forgery, when the man's name & seal are made use of, to effect that which was contrary to his intention: A gives a Deed to B of 3 acres of Land the 15th February. A gives to C a Deed of the same Land the 17th but

Forgery

dates it the 12th - This is forgery - because the last writing cancels the former, & prevents the operation of Justice & Equity -

He orders his draughtman to draw his will, & in drawing it, he inserts Legacies without the order of the Testator - This is forgery, for he has effected what the Testator never intended. -

To use an instrument so that an effect may

3 Mod 66. be produced different from what the man intended
8 d^o - 197. & to prevent Justice & Equity, is always forgery.

Alia 69. If a man who owns a note, alters it from a greater
Salk. 375. to a less sum, it is not forgery - but the least alteration in an instrument, wholly destroys it -

It is a general rule that one cannot commit forgery by omission. This is a mistake - for
Moore 760. if the omission produces the effect of altering the intention it is a forgery: as in the case of Wills.

The principles of Forgery by Statute are the same as by Common Law - The Statutes have only

Cheating, Trespass vi et armis.

27-

increased the number of indictments which are the subjects of forgery
in Statute law, & common law. Cases for the purpose of preventing
Justice & Equity is Forgery

Cheating

4 Bl. 157-
Cro. Jac. 97-
2 B. & A. 78-
1 Sidg. 312-
Cro. Eliz. 531-
3 Mod. 18-
6 d. 105-
1 La. R. 1030-
1 Hawk. 188

Cheating is sometimes a criminal offence - where it is
done by mere naked lying, it cannot be prosecuted.
But where a man by means of some artful device (more
than mere lying) defrauds another of his rights, he may
be punished as a criminal: so for using false weights &
measures, false dice &c - A miller is indictable for cheating -

Trespass vi et armis

Lecture 7th

Trespass includes all offences, but when here
confined to simple Trespass - This is sometimes
only a civil injury - but when attended also by a
breach of the peace, it is a criminal offence.
It is punishable by fine & sometimes by imprisonment
Some elementary writers say that a mere assault is
not a breach of the peace. Battery is an unprovoked
or wanton beating of another, is always a breach of the peace.
In which case there can be no necessity,

Riot.

1 Vent 251-

1 Pa. 594-

1 La R^d 484.

1 Str. 196.

4 Wh. 146

A Riot is the tumultuous disturbing the public peace, by three or more persons, who have assembled of their own will, with an intention to support each other in any opposition which may be made to the execution of their unlawful enterprise, or an enterprise of a private nature, which must be executed actually, in a turbulent manner, & occasion terror, or have a tendency to excite terror. Whether the enterprise be lawful or unlawful, if it be done in this manner, it is a Riot.

1^o It must be done by three or more persons

2^o Of their own authority, without any right by Law. A Sheriff may call the posse comitatus or militia officers & soldiers & he is not a Rioter.

6 mod 43-

4 Burr 2093-

1 Pa. 595-

Mun 656-

3^o They must assemble with a view to execute an enterprise - But if they meet on lawful business & then enter into a combination it is a Riot.

6 mod 151-

3 Co. 1263-

4^o It must be in a turbulent manner, attended with violence, so as to excite terror. Offering to beat a man causes terror. So do threatening speeches & turbulent gestures. If there is no offer of violence, & yet terror, it is not a Riot.

Riot Rout &c

29

3 mod 3

10 de 117

2 Thow 156

It makes no difference whether the enterprise be lawful or unlawful. If done in the manner above described it is a Riot. Removing nuisances in a violent & tumultuous manner is a Riot. If a man breaks open his own house in this way, in which another person has shut himself up, he is a Rioter.

6 The thing must be done or actually executed to constitute a Riot

Rout

It differs from Riot only in this, that in the former the enterprise is not executed. It has every ingredient but actual execution.

Unlawful Assembly

This is where three or more persons meet to do an unlawful act, & attempt nothing. But there may be an unlawful assembly without an intent to do any thing.

An Affray is the fighting of two or more persons in some public place to the terror of the people.

Rout affray &c

Lecture 8th

S. 61 -

There are instances in which a person who fears
of outrage may assemble his friends together -
He may take his friends into his house, to
defend his castle & it will not be an unlawful assembly -

S. 61 -

These may be suppressed - It is the duty of
certain characters to suppress them. There are
certain officers, called peace officers, such as Sheriff
Deputies or Constables. These persons have power to
call the peace Comitatues. Grand Jurors must do it,
upon Complaint. Private persons may suppress them
upon some occasions. They have no authority to
compel each other to do it, neither are they culpable
if they do not: unless called on by Peace Officers -

They are punished according to their stupidity, by fine
imprisonment or pillory -

One person may be indicted, with others whose names
are unknown. If the jury find both guilty & one guilty,
the Court cannot pronounce judgment on that verdict -

Libel

37-

but if they find A.B. guilty with others well known
to be not guilty, it is a good verdict, & judgement may be understood

Libel

A Libel is a malicious defamation of character
expressed in writing, printing, ~~speeches~~ signs or paintings
Leaving a tendency to blacken the memory of some
one dead, or the reputation of some one alive
& to expose the person or his memory to hatred
ridicule or contempt.

It is a crime because it disturbs the public
peace and tranquillity. There is a difference
between a libel & common slander. It is true
that whatever is legal slander if reduced to
writing would be a libel - but many things
are libels which would not be slander. Whatever is
said of a man which would reduce him to a criminal
prosecution, is slander. But libels do not go on this
ground - Reduce to writing that which will expose
him to hatred contempt & ridicule & it will be a
libel. You cannot sue two persons for slander, but for a libel you can

5 Co. 195-

5 mod. 165-

Salk. 418-

2 A. R. 416-

1 Wilk. 403-

Hob. 215-

2. Mod. 119-

Str. 398-

Libel

Libel 819 - A defamatory writing expressing under the initials
 Hatch R. L. 194 of a person's name, or with a feigned name, so that
 Lath 470 it is plainly obvious to whom it refers, is a Libel.

So, if it is expressed in a taunting, ironical
 H. 10' 215 manner, it is a Libel. If the jury know who is meant
 this is sufficient to warrant them in bringing in a verdict.

5 Co 125. Holt 253 If the contents of a libel are true, is it a justifica-
 Moore 637. The tion? In slander it is. In private Libels it is
 408 Carth 15 not but in public Libels it is a justification. I
 Hardness 417. think, on the Principles of the Common Law -

1 Esp. 2249 - It must be published, else it is no offence -
 9 Co 59. after which both publisher & writer are liable.

Libel 116, 17, 18, 19. If there is a malicious reading, it is a publication:
 3 Co 2687 - otherwise, if not malicious. The elementary writer notwithstanding.

Publishing books that have a tendency
 Libel 224 - to debauch public morals, is an offence
 Libel 844 - at Common Law.
 2 H. 934

Libels

33-

Lecture 9th

Lo. R. 341 -

1 Lev. 139 -

do - 240 -

Hobart 62 -

As all Libels have a tendency to disturb the public peace, they are no less Libels, if they do not, therefore if a letter is written ~~to~~ one knows its contents but the writer & him to whom it is sent, it is a Libel.

11 Bl. R. 294 -

Pull & Pss. 391 -

4 Duff 129 -

Every thing that tends to bring a man into contempt, ridicule or hatred, if published in any manner before statue, is a Libel.

When the memory of the Deceased is libelled, it is necessary that it should be inserted in the indictment, that it has a tendency to disturb the public peace -

In a Libel there are two parts for the jury to find. First, the publication, & secondly that the innuendo of the attorney is supported. It is true, that where the intention is so mixed with the Law, that they cannot be separated, the jury are to find both; but where they can be separated, the question of Law is to be left with the Court.

Libel - Homicide

Where the act may be innocent, the intention may be left to the jury - but when the act is itself criminal, the jury are only to find the act - As an instance of this position - There is a Law of this State forbidding a man to Deed away his Land, the title to which is in dispute & the Land in possession of another - and the grantor & grantee are both punishable. Now in an action against the grantee, the jury are to find both the fact of the receiving of the Deed, & the intention of receiving it. But in Libels the publishing is itself criminal, & the jury are therefore only to find the facts before stated.

3 Burr! 428-

The general rule is that when an innocent act becomes criminal by intention, the jury are to find it. But when the act is criminal, the intention is an inference of Law.

8 Burr 2688-

Homicide

Homicide literally speaking, signifies the killing a man. It is divided by the English Law, into three kinds justifiable, excusable & felonious. There is no

Homicide.

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distinction in this country, between the two former, because excusable homicide does not occasion a forfeiture of Goods or Chattels, as it does in England.

1. A person is justified who commits homicide thro an unavoidable necessity, either in the execution or advancement of Justice. As in the execution of Justice; when the Sheriff executes a criminal, condemned by a proper tribunal to death. It is laid down as a principle, that

when a Sheriff executes a criminal, by a warrant from a Court, which has not jurisdiction of life & death, the Sheriff is not justifiable.

This requires some explanation. A Sheriff is bound to know the Laws of the Land. When therefore, it is apparent, from the face of the warrant, that the Court had not jurisdiction, & he executes a man, he is guilty.

If he does not execute him sewato juris ordinis he is guilty.

2. When he commits it for the advancement of justice. When a person has been guilty of felony & exists when an attempt is made to take him

1 Ld. R. C. 106. 76

106. 76. 98.

Moore 333. 1 Hawk. 76.

1 Hale 497.

Finch 62. 91.

3 Inst. 52. 1 Hale 504.

1 Hale 494. 1 Hawk 76.

1 Hale 498. 1 Hawk 461.

Homicide

1 Hol. & C. 496 -

Killenge. 28 -

if he is killed, the officer & those assisting are justified. As in case of a riot, execution of a criminal process; prisoners in goal. There must however be an apparent necessity & no act of revenge.

Foster 241 -

Polam 121 -

Suppose the criminal does not resist, but runs away, & the officer cannot arrest him, except by wounding, or killing him, is he justifiable in so doing? On the principles laid down by the elementary writers he is. But I doubt the propriety of it.

Foster 242 -

1 Comyn. Dig. 180 -

Fost. 240 -

Stowage 499 -

Every private person has a right to take a felon, & has the same privilege as an officer. The man who has authority to arrest a felon, & in doing it necessarily kills him is justified.

In a civil process no private person can take another, & no officer is justified if he kills him to take him, tho' he may wound or kill him after he is taken to prevent his escape.

1 Hol. & C. 488 -

1 Hawk. 71 -

1 Bac. Elem. 34 -

2. Homicide is "justifiable" in defence of oneself, goods or house. Whenever an attempt is made to rob or murder a man, if he kills,

Homicide.

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1 Hal. P.C. 488
above

the assailant, it is justifiable. When any one attempts to get into his house with an intent to commit a felony, or attempts to burn it, if the felon is killed it is justifiable. When he attempts to commit a rape, the woman, husband or parent may kill him.

Justifiable homicide goes on the ground that there is not the least fault or blame on the part of the slain.

Lecture 10th

2. Excusable Homicide. This species of homicide does not claim exemption from punishment on the ground of authority from Law, but on the ground of want of blame. In every case of excusable homicide there is no blame in respect of intention or negligence. Where the latter is found it is a low grade of manslaughter.

4 Hal. 182

This species of homicide is of two sorts, either by accident, or ^{or accident} se defendendo, or se defendendo upon principle of preservation. 1 accident. Where a man in the pursuit of a lawful business, without any intention, kills another, it is either excusable homicide, or manslaughter.

Homicide

Where ordinary care is used, it is the former, where culpable negligence is perceived, it is the latter. e.g. When a person is cutting wood with an axe & the head thereof flies off & kills another; this is not murder, for there is no malus animus. It is not manslaughter, for there is no intention to kill, & no negligence. It is therefore excusable homicide. But if it flies off once & he puts it on carelessly, & it flies off again & kills a person, this is a low species of manslaughter, because there is negligence. A. is on a horse, B. whips him & he runs over C & kills him. A is excusable but B is guilty of manslaughter, because the act of whipping was a trespass & unlawful.

1 Hawk 43-

1 Kellenge 40

A Schoolmaster chastises his scholars moderately, & by misadventure death ensues. This is said to be excusable homicide, but I think it is justifiable, because the authority to chastise is given him by the Law of the Land. But suppose he whips him immoderately, such as in the view of every body is beyond the bounds of

Kellenge 65

5 mod. 287

Homicide.

39-

1 Hawk. 73. 74 reason, & he dies, this is manslaughter, &
1 Hall. C. 473. 474 maybe murder. The malus animus is
deducible from the instrument & use.

Wrestling is a lawful exercise, & if an
illegal play is used, & one is killed, this is excusable
Homicide. So if in playing foot ball one
is killed, this is also excusable Homicide -

But suppose they are amusing them-
selves at a play which is unlawful, as in
-Hester 260 -
Strange 499 - England, fencing with a sword, & one is killed,
4 Comyns 83 - this is manslaughter. If two boys are throwing
Strange 481 - stones at each other, & one is killed, this is
1 Hawk 74 manslaughter. If a stone is thrown with
1 Hall. C. 472 - a prime & deliberate design to do some great
Hester 261 - bodily harm, & one is killed; this is evidence
of malice & is murder.

It is not every provocation that
makes the crime manslaughter; there
must be an adequacy in, or ground for
the provocation. ex. gr. Two persons
are sitting at the ends of a long table disputing

Homicide

in politics, one of them gets ^{the} engaged, he takes up a glass bottle standing upon the table & throws it at the other, but misses him - the other in turn throws one at him & kills him, this is manslaughter of the willful kind - a man is asked by his servant when the wife dancing is to be such an evening - The master thinking himself in justice, kills the servant, this is murder because there is not sufficient provocation to authorize the act. This happened 60 years since in the State of New York & the master was executed.

A distinction is made in England between the criminality of two acts which does not exist. If one has a deliberate design to commit a felony & unintentionally kills another it is murder; but if he has a design to commit a felony, it is manslaughter - e.g. If in shooting at hens with an intention to steal them & you kill a person it is murder; but if in shooting at a hawk you kill a person it is not murder - I think if one is murder both an, & if one is not, neither is the other.

4th. 192-

193

Foster 258-

Homicide

I should say it was not murder in either case, but in the former you deserve to be whipped, & in the other to be put in the pillory & have both ears cut off.

From what has been said, we deduce the following rules -

1st Where a person is engaged in his lawful business, & is guilty of no fault, no negligence, no intention, & kills another, it is Excusable Homicide

2 Where there is negligence perceivable it is manslaughter.

3 When he has an intention to do some great bodily harm, & kills another, it is murder

4 When he has an intention to injure property, if it is felonious, it is Murder, if not felonious it is manslaughter.

Manslaughter

Lecture 11th

1 Hal. P.C. 466-

Manslaughter is the unlawful killing another without malice. It is divided into two kinds:

1st When death ensues upon the happening of a sudden quarrel; & 2^d When death ensues in consequence of some unlawful act, but there is no intention to kill. The former is voluntary the latter is involuntary -

1 Hawk. 82-

1st Voluntary manslaughter. If upon a sudden quarrel two persons fight & one is killed, it is voluntary manslaughter, & so if they go into a field to fight it out because it is done out of passion. So if a man be greatly provoked as pulling his nose & immediately kills his aggressor it is manslaughter. But if there

Kelleys 135

Foster 296-

is time for the passions to cool, & afterwards the person provoked kills the other, this is murder. If a man takes another in the

1 Hal. P.C. 486-

1 Hal. P.C. 486-

act of adultery with his wife, & instantaneously kills him this is manslaughter, because

Manslaughter. Murder.

It is the highest of provocations. In this case the Court orders the punishment to be slightly inflicted.

* He takes blame when a man attempting to do some unlawful act, kills another by accident.

2 Involuntary manslaughter. When a man goes into the land of another in order to kill his cattle & unintentionally kills the owner, this is manslaughter. So when the act is lawful but it is performed in a negligent way as in the case of an ape in the last section. Upon a sudden great provocation a man slays another or kills him with a blasting instrument & he is punished as for murder in consequence, by a Statute which none of the other States have adopted. From what has been said we collect the following - There may be sudden quarrels in which a man kills another the intention, & it is manslaughter. There may be cases in which there is no intention to kill, but only to commit something which is unlawful & then it is manslaughter. There may be cases in which the act is lawful but performed in a negligent manner & then it is manslaughter. Our Statute leaves the lowest kind of manslaughter to be punished as a misdemeanor.

Murder

Murder is by some elementary writers & which

Murder

Stea 856
— 884—

4 Conger 196—
Palmer 518—
2 Hawk 29—
1 do 78—
1 Baldp 432.

How. 474—
9 Co. Rep 81—
Loe. R 143—

Hallage 26—

will answer for the present) defines to be "the willful killing of any of the human race with malice aforethought" But a man may kill another without doing the act, if he is the cause of producing Death, if the circumstances prove that he had an unsocial heart. As if a jailor put a prisoner into a room with one who has the small pox, when there were other rooms: or when a son exposes a sick father to the cold against his will, by reason of which he dies: or if a harlot who laid her child in an orchard & a kite struck it whereby it died. Using thus to be the instrument of killing is a murderer.

A person may in some instances thro' negligence be guilty of murder. This will always depend on the circumstances of the case. If the negligence the unsocial heart is discoverable it is murder. By the common Law, if the person does not die within a year & a day after the wound given it is not murder. But no negligence or inattention in the party injured if he dies within a year & a day, will excuse the person from the guilt of murder.

Murder

Living 26-

This is true also in civil cases, as in case of
a Physician who destroys a patient's arm &c.
But whether the killing a child in the womb
is murder or not depends upon the question
whether the child is in esse or not.

Murder as defined by Sir Edward Coke is when
a person of sound memory & discretion unlawfully
killeth any reasonable creature in being & in
the peace, with malice aforethought, either
express or implied.

Hoster 228-

La. R. 1493-

Killing 27-

Living 773-

The express malice may be evinced by lying
in wait, by threats, by former grudges: & the
fact of killing, is prima facie evidence of malice.
The whole burden of proof lies on the prisoner,
to show there was no malice. I do not think
that Duelling ought to be put on a footing with
murder. In famous punishment would be better.

Section 12th

1 Hawk. 74-

La. R. 1489

There is no instance in the Books in which
provocation merely by words or by gestures will
excuse the Slayer from the imputation
of an unseasonable heart.

Murder

Inst. 291-
Hank 87-

The 6th ingredient in Murder is the malus animus. But that shall be evidence of this, does not always accord with our feelings. If there is no intention to commit a Felony, yet if the Circumstances be such, as show that the probable consequence would be bloodshed, & one is killed, this is held to be murder.

1st Hank 84-

Foster 308-

Strong 499-

Co. Bar 372-

587-

6 Mod. 173

In all cases killing persons clothed with authority, in the execution of the duty is murder. If he is a special officer he must be killed before it is murder unless he is breaking into the house then it is warrant if asked. If the officer has no authority, he is in the same situation as any other man.

Killing 58-55
61. 129. 131.

Foster 297-

If one is under guard, the Circumstances, show the malus animus it is murder. A assaults B & he retreats - for a possible & then kills A - this is excusable homicide. But if B assaults A & finding him too powerful retreats, & A follows, & B kills him, this is held to be murder.

End. Rogers 1498
3 Burr 2799

Two strong cases of manslaughter.

Murder & Rape

47-

- Heard 158 - To all cases where there has been time for the person to subside it is murder even when death was not intended. If by a mob a man is killed it is murder in them all - When it is evident that the means make use of were not necessary it is murder.
- Chalm. 385. See 771 - If a person is killed by one. Bitten in the neck.
- Challenge 117. See 37. If the object of all, it is murder in them all.
- How. 101. 474. 962. 81. When the servant assists his master, & a person is killed in him it is manslaughter, in the master it is murder.
- See R. 1276 - Suicide is common, ^{low} occasions a perfectness of passion & chetels - but this amounts to nothing more & less -
- When a person has been assaulted unlawfully, it is said to be sufficient provocation to the jury that they may find to excuse him. This leaves no doubt -

Lecture 13th

Piracy -

- See How 2099 Robbing on the high seas, by vessels not authorized.
- Wal. R. 437-8. This crime is not punished by the common law courts but by the Admiralty courts.

Rape -

- See R. 170: It is no mitigation of this offence, because the female yields thro' fear. A common prostitute

Rape - Bigamy - Adultery

may be ravished. Upon the principles of the Common Law, complaint need not be made forthwith. But by Statute, it must. All persons who are present assisting, are principal offenders.

See Lord Baltimore's case in Burrows Reports.

Bigamy

Bigamy is when a married person marries another, the former husband or wife being alive. This is properly not an offence at Common Law, but at the Ecclesiastical Law, which is the Common Law as it respects this crime. In Connecticut it is punished by Statute. If one party is absent seven years & not heard of, & if heard of, in low circumstances in life, the other party may marry again, without being guilty of an offence. The Law presumes the absent party to be dead, & administration may be taken out on his estate.

Adultery

Adultery is the criminal connection of a man with a married woman. This also is an offence not punishable by the Common Law Courts, but by the Ecclesiastical. In Connecticut it is punished by Statute.

We now come to consider Statute offences which are adopted in this Country.

USURY

Geo. E. 20-

Doug. 224-

3 Wilson 262-

3 Bl. Rep. 796

2 Mod. 307.

1 do — 69-

1 Saunders 294

Cropper 114

3 Atkin 154

Yelverton 30-

3 Wils. 390. Cropper 253.

208. 509. 1 Shaw 8.

Carthar 68

1 Atkin 339-

Usury is a crime, because it is liable to be punished. There are two kinds of usury - 1st the 1st which is not punishable as an offence, but only occasions a dissolution of the obligation. 2nd When it does not destroy the obligation, but incurs a penalty - Whenever a man by any means whatever contains within his contract more than legal interest for the use of his money, it destroys the contract, but does not subject him to punishment. But where too much is received he is liable to a penalty.

Lord Hardwicke held a different opinion, but it is not considered as Law.

At Common Law months mean Lunation months - & sometimes in casting interest it may be ambiguous - But in these cases the Law presumes there was no contract until the contrary is proved.

Where a person borrows from a lender his principal he may receive more than lawful interest. This is the principle of all annuities & bottomry loans &c. See Lord Spencer's case. —

USURY COURTS.

SECTORE 12th

Moore 751-

Montant 115-

Moore 80.88

Co Litt. 369-

1 Burr. 300

Selling a voidable title is an offence under
a Common Law & by Statute. Whoever
sells a title to real property when
he is out of possession, & another in possession
claiming by an adverse title, it is an offence, &
punished by fine & imprisonment. By Statute in
England he forfeits the value of the Land. In Con-
necticut half the value of the Land. But on the
Statute he must be prosecuted within a year.

COURTS. In Connecticut

1 Superior Court. This Court has exclusive jurisdiction
over all capital offences, over manslaughter & those which
lead to Mergate except horse stealing & here it has concurrent
jurisdiction with the County Courts as also over crimes & high mis-
demeanors. 2 County Court. Exclusive jurisdiction in all
offences not named & when the punishment is less than death
& Mergate concurrent jurisdiction with S.C. Where the damages
are over \$4 appellate jurisdiction from Justices of the Peace
3 Justices of the Peace. Over any crime where fine inflicted
under §7. Where Corporal punishment is inflicted appeal allowed.

2 Hawk. 115-
119 - Bro. Chas. 901-
Geo. Jac. 130. Hawk.
120. Latch 173-
Bro. Cas. 234. Foster
La R 1296 - Osborn
208. Cowper 1st-

Private persons are bound to make
arrest persons - they are bound when felony
has been committed, or a dangerous wound given
in their presence. They may do it. When they
think a person has committed a felony - common
law will justify them.

If no crime has been committed, & a private
person arrests another, is he justifiable? The old
rule would not allow it, but late decisions are
to the contrary.

Cowper 1st

If an officer breaks open an outer door in
a civil case, he is liable, & a long of execution
had -

Foster 321-

Where a person has committed felony,
or given a dangerous wound, a private person
or an officer may break open a door to arrest
him; he must however give notice, & request
peaceable entrance first. He can indulge in no
revengeful act, nor do any thing wantonly.
For any offence less than felony a private person
is not justifiable in arresting. A peace officer
may arrest in a private house, but not a private person

Arrests. Bail

6 mod. 173-

If a person once arrested escapes to his house the officer may break the door -

If an officer takes bail & the prisoner gets into his house, the Bail may break open the door

A peace officer has a right to command help, but a private person has not -

The former has power to carry before a justice but the latter has not, he must deliver him to the Constable or Sheriff.

Colt 202. 1 Lev. 21.

Cre. Can. 75. Pl. 1002.

2 Wils. - 10th 1. 11th.

5 to 2. 2d Br. 1692 -

6 mod 179. Cre. Clive.

130. Cre. Jan. 81. 4 Comyn

285. 2 R 546. Salt.

1st 6 -

If a constable has once arrested an offender & lets him go, he cannot arrest him a second time -

because it would be dangerous to allow them to conduct officers with warrants. If the warrant is illegal, on the

face of it, the officer is not justifiable.

If a man forfeits his bond, he may be arrested for the same offence.

Bail

Lecture 15th

This subject is generally if not universally regulated by statute, of course it supersedes the application of the principles of Common Law.

Bail.

2 Hawk 140 -
 6 mod 231.
 247

Let it best they should be known. When a person is arrested & brought before proper authority, if the offender is bailable, the authority may, & ought to bail him, if he can get bail; the sum of the bond being fixed by the authority; if he cannot procure it he must be committed. The bond may be taken either to appear in court at the proper time, or to abide the judgement thereof.

There is a practice in England for the Sheriff or Constable to take bail themselves, but not known in this country. If the bond is taken for his appearance in court & he appears, the bond is discharged, but a record of the appearance must be made. The Bail are looked on as the jailers of his own choosing, & when they please they may imprison him if he does not wish to go before proper authority to get other bail. They have also the power of forcing him to appear in court if he refuses.

The bail taken must be sufficient. The authority taking, acts in a ministerial, not judicial capacity; & is therefore as much liable as a Sheriff, in civil cases, if the bail is insufficient.

Bail

The old common Law principle is that there must be two sureties in Bail for a felon: but it is now entirely disused. The Law only requires that it should be sufficient. If the authority is imposed upon by the Bail, he may take the person & confine him until he gives bail a second time.

If the officer takes Bail in an offence not bailable he is liable. So he is, if he refuses to take bail in any offence which is bailable; for he acts in a ministerial capacity. The Supreme Court in every country has a right to bail. They have exclusively the right in Homicide, arson, larceny, defrauding public money, treason & falsifying the King's Seal.

In Connecticut their usage is peculiar - all offences there are bailable, except capital offences. In manslaughter there appears to be one difficulty in bail. The Attorney may indict for murder. The Supreme Court has there the power in capital cases, but it is seldom exercised. There is an analogy in bail in Civil & Criminal cases. A man may take out process to arrest the body of a Debtor, & if bail is taken, it is not forfeited during the life of the execution.

Couper 333
1 Bar. 222

1 M. Rep 148

Strange 911

Bail - Contempts.

This is true only of Bail Bonds. When the bond is forfeited, it is liable for debt & costs, & the return of the officer is evidence whether forfeited or not. The officer is not obliged to take that bail which he reasonably thinks insufficient.

Lecture 16th

To constitute an escape, there must have been a lawful arrest, which is made either by seizing the body, or when the party knows that an arrest is to be made, voluntarily goes & submits to the officer. In civil cases a recaption any time before action brought, will excuse the officer; In criminal cases to constitute a voluntary escape, so as to incur the punishment of a voluntary escape, there must be a corrupt intention; In civil cases the letting him go with such intention will subject the Sheriff

Contempts.

The mode of proceeding is very easy. If it be committed in open Court, this is without process. They order the Sheriff to commit the person to goal, & a record is made of it by their Clerk. In these cases the power of the Court is supposed to extend no farther than confinement during the session. The reason plainly is, because after that they can make no disturbance. But there are

Contempts.

Contempt out of Court, & the mode of proceeding is as follows: some person makes an affidavit of the fact, before the Court, who consider of it - If they find the fact do not amount to a contempt, they make a record of it & dismiss it. If they do amount to a contempt, a notification, being made under of Court, is issued, commanding the person charged to appear on such a day, & show reason if he have any, why attachment should not issue against him. If he does not appear there is good reason for believing the truth of the fact stated against him in the affidavit. If he does appear, the Court may enquire of him, under oath, & if he denies, they dismiss him - Yet if he swears falsely, he may be indicted for Perjury. If the reasons given are not sufficient, an attachment will issue -

Officers of Courts may be guilty of contempts, which others cannot. It is not every neglect of duty in an Officer, which makes a contempt. It is generally true, that when there is an abuse of Office, the Officer is both liable to the party injured, & to the Court, for a contempt. The principle is corruption, & the Court can confine him, until he makes a reasonable satisfaction. Attorneys are also liable for a contempt.

Jurors are guilty of a contempt when they refuse to come to Court, or to be sworn, or to give in any verdict.

Bro. Cas. 146

1 Talk 84

8 Mod. 123 -

11th Rep. 892 -

6 Mod. 73 -

Dan. 498 -

3 Burr. 1329 -

Moore 770

1 Talk 87 -

Eng. 547 -

621

420 -

Dye 218 -

2 Co. 28. Baugh 152

Holab. 114 -

In all cases where persons are not officers of
 of Court, but have a duty to do & refuse to perform
 it, a mandamus issues, & if they then refuse
 they are guilty of Contempt.

Strong 510 -

810 -

1150 -

1154 -

La. 1521 -

HoR 376 -

Pardon

In former times by the common Law it
 was held, that there could be no pardon until
 conviction: But in later times there have
 been pardons before conviction. The pardon
 restores the man to his rank in society
 except the imputation of guilt which his
 conviction or confession has occasioned -

Mercantile Law

Lecture 1st

The mercantile Law is applicable to transactions of a particular nature. The Law merchant is called the custom of merchants.

But it must be received in a different light. It differs from a custom, in all its parts. A custom is a Law of a particular place, different from the general Law of the Land. This the Law merchant are not bound to know. But the Law merchant they are bound to know, because it is applicable to all commercial countries, & is the same every where, except varied by custom or statute. That the common Law is to all the subjects, the Law merchant is to mercantile subjects. This is the Law of the commercial world generally.

The things on which this Law operates are the following

- 1 The whole doctrine of Insurances
- 2 Bills of Exchange, & promissory notes partaking of the same nature
- 3 Charter Parties
- 4 Bottomry & respondentia bonds.
- 5 The Law of Shipping
- 6 Rules regulating seamen & their wages—
- 7 Tonnage.

The leading distinction is that Equity is interwoven with the mercantile Law, & excluded from the common Law. Mercantile Law differs

Mercantile Law

from the principles of the Common Law in many respects—

1. Difference. By the Common Law, no security could be so negotiated or conveyed away as to give the Holder a right of action in his own name. But it can be done by the mercantile Law. At Common Law the property is not vested in the purchaser: all he gets is a power of attorney to collect the money on account & to accept & a discharge by the assignor & to sue & recover against the promisor or any body. In Equity to be sure the assignment was protected by subjecting the assignor to an action on the covenant & also for the fraud in discharging the obligation. Nay, it could compel the obligor to pay the money over again, on the ground of having fraudulently received the discharge. There is, however, one exception to the common Law rule, that a man cannot convey to another a right of action; & it is when in the sale of lands there are covenants of warranty extending to him & his assignor. here it is said the covenant runs with the land, & the warranty is to every man:—of course any subsequent purchaser may sue the original covenantor.

Mercantile Law.

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But the Law merchant implies a covenant that the drawer will pay the holder.

2^d Diff. By the Common Law, an action cannot be maintained by one man against another unless there is a privity of contract by this Law there can be.

3^d Diff. It is not in the power of the common Law to create an action in favor of one man against another for a voluntary ^{custody} ~~custody~~ but by this Law there can be tho this rule does not hold in all mercantile transactions.

4th Diff. By the Common Law, if the consideration is once passed, you cannot create an action without a subsequent promise. By the mercantile Law you can.

5th Diff. In and in the consideration of a contract by the common Law does not vitiate it. An action may be brought for the recovery of damages but by the mercantile Law the least shadow of fraud stops the bar.

6th Diff. The want of consideration can be averred against any contract, except a specialty, at common Law. but by the mercantile Law, when the bill is once endorsed, you cannot aver want of consideration. There are but two instances, in which the turpitude of the consideration can be averred. Those are Usury & gaming. The words of the act are to all intents & purposes

Buller N.D. 1744

2^d H. 946. 1222.

615. 3 Burr 1354.

1744. Rep. 390

Mercantile Law

Lecture 2^d

7th Difference. By the Common Law, where one of two joint Debtors, is taken in execution for the same thing, & supposed to escape, you can never take the other. The presumption is, He has paid the Debt. An escape is considered as a discharge & a discharge to one is a discharge to both. But the principles of the mercantile Law are different an escape of one is not a discharge to the other.

8th Diff. By the Common Law, months mean Lunar months; by the mercantile Law, they mean Kalender months.

9th Diff. By the Common Law, if a buyer, purchases goods, but does not take them away, & gives his note for the price, they are liable to attachment & execution, & the seller cannot retain them in his hands thro' fear of Bankruptcy of the buyer. But by the Law merchant, when on a newly made bargain, there is danger of Bankruptcy the seller may retain them in transitu.

10th Diff. If a contract is to be fulfilled on a certain day & that day falls on the Sabbath. It is to be paid on Monday.

Mercantile Law

at common Law - & on Saturday by the Law Merchant
 11th Diff. At common Law where notice is to be given,
 any manner of notice is sufficient. But by the
 Mercantile Law, a certain particular form is necessary.
 12th Diff. A man who comes by a Bill of Exchange
 or promissory note fairly, may hold it

Insurance

It is an agreement whereby one is a contract of Indemnity against certain
 party, a consideration of a sum of
 money, either given or contract for
 damages to pay the other party a
 certain sum of money upon the
 happening of some event. ^{Policy}
 Policy of Insurance is the contract
 which the insurer of the agreement
 is not paid.

This may be applied to Houses, Lives &c. as well
 as ships. The latter is more properly called
mercantile Insurance; which extends to Merchants
 Ships & cargoes, bottoming & respondent's bonds, monies
 laid out by the captain for repairs &c. To bring it
 under the mercantile Law, it must be a nautical
 contract. Of such we shall treat in the following lectures.
 This Insurance is affected by an instrument called a
 Policy, which contains the contract & any thing
 foreign to it, either by writing or said is out of the contract.

N.B. the nature of this contract is
 contract of indemnity.

14-

Insurance

Oct 170

1 Pop. N.B. C. 373 Cas. of very slight
concealment & vacating a hole - also 10 Bost
T.N.R. 8. 2 cases in grade 166. A.R.B. 407
1 Bost. P. A.R. 157. 500. 45. & margin.
420 500.

Every contract contained in a policy which is called a "warranty," must be literally complied with: but if it is a representation merely, if it is complied with generally & substantially, the policy is not vacated - The representation is verbally or on another paper, than the policy - There are a great many policies which are void ab initio; - The causes which produce them may all be reduced to three - Fraud, unseaworthiness, & illegal voyages - Each of which we will consider in its order -

2 M. 460 ~

allow " falsehood or misrepresentation
evacuates the policy. The 32^d Feb '96 & this
to be by mistake Macdonald v F. & A. Doug. 26

* 2 of 17^{ms} 170.
M. R. 403. Fink 180.
For. L. S. Y. R. 14

²² I suppose will avail himself of the circuit but I do not believe by the 1st. 83.

and on me as being the the in men
 1. in 1840. Day. 306. Comp. 789. 3 Part. 5x2.

1, Fraud. It is a general principle, that fraud vacates the contract. It operates equally well, as respects policies of Insurance. It is as much a sin to conceal a fact that ought in good conscience to be disclosed, as to tell a direct falsehood. ^{deceit} It is a principle of the common Law, & remains so to this day (tho I think I venture) that a man may be cheated & yet not have his contract vacated. He can only recover damages for the cheat. But by the mercantile Law this principle is not allowed. The deceit destroys the contract entirely. The maxim here is that no man ought to be bound by a contract which he never intended to enter into, & this maxim ought to be adopted by the common Law.

1 Bl. Rep 594

3 Bureau 1909.

+ 1/2 lb. decided by an agent. T. 6. 12

Insurance

24th Nov. 379 -

Park 8 -

3 Dec. 465 -

Who may insure? By Statute in England, no companies except the London Insurance Office & Royal Exchange Office: Yet individuals may do it.

3 Jan. 1419 -

17th Dec. 427 -

When there is a false representation, falsely made, it vitiates the Policy. as also a misrepresentation made thro mistake - a concealment of circumstances vitiates it, & here the only enquiry is, what circumstances ought & what ought not to be disclosed -

17th Dec. 465 -

2 Dec. 1183 -

Opinion of a Judge - a concealment is a fraud upon principles of natural Law

17th Dec. 463

Park 182 -

In insurance or freight, concealment will often vitiate the policy - we may not see the materiality of the circumstances that constitute the fraud it is sometimes the possibility of it.

3 Dec. 1905 -

Doug. 240 -

Blanchard vs. Hatcher

A man has never a right to conceal a fact within his knowledge, which he has reason to think if told, the insurer would alter the premium. But he is not bound to tell his own speculations & private opinions. If he knew any fact he is bound to tell it - So if it be a mere rumour.

Doug. 292

3 Dec. 1361 -

Now after the case that there are many underwriters, & if there is a false representation made to the first insurer, & not to the rest it fees every one.

Warranty - Fraud &
66-

Insurance

Representation of the agent -
the insured is not bound
to believe the agent's statement
unless he has a right to rely on him
and must rely on him at 21/2
at 590.

from the contract; & the reason is the insured generally get a respectable Merchant to sign first, which always induces others.

To make a warranty, it must be inserted in the policy. It has been made a question, whether if a representation made in writing & attached to the policy, is not a part of it. It has been decided that it is not. The policy is an instrument by itself.

Whenever a warranty is made & expressed in the policy, it must be literally & strictly complied with - but if it is a mere representation, there may be deviations which will be excusable in the insured & subject the insurers, which must be determined by a jury from the circumstances of the case. supp that a representation be good compliance with a substantially

See cases of the effects of a warranty. 1 R. 365.

It has been contended that the insured ought not to suffer by the fraud of the agent. It is strange such an idea should ever be indulged. The employer ought to suffer for the fraud of his own agent rather than any other. It was occasioned by the old Common Law idea, that for violent & torts of agents, the employer was liable, but not for frauds. This was sanctioned

Doug. 247

At Dowell vs

Trader - 22

vs Wilkinson -
76

Carver 784

1 R. 365 - 601

Insurance

1 S.R. 12

in the Boreen case. But it is now settled that the fraud of the Agent viciates the policy.

2 Nemo 206

2 O.W. 170-

It has been a question whether if the policy is viciated by the fraud of the assured, the insurers are liable to return the premium - Were it not for principles of policy, they ought to return it. Contracts for lives expectancies will be annulled by Court of Chancery, yet they will compel the payment of principal & annual interest

Courts of Law have determined that the insurers shall retain the premium on the ground that they have run a great hazard of paying a large sum of money on a fraudulent contract - Judge Reeve thinks this a sound reason.

Almost all commercial countries have made their frauds crimes -

Part 234. Doug.
Case Johnson or Dutton.

A trade carried on in contravention of an embargo is illegal; of course, an insurance on such trade is void

Commerce with an enemy is illegal. Is an insurance upon such commerce illegal? Clearly so on principles; yet it has been considered by Lord Mansfield & Lord Hardwicke otherwise, & in this temporary leave in England show the prevailing ideas. There is an exception to the rule, that an insurance upon an illegal transaction is void. Indeed it was at length decided that an insurance upon goods purchased in an enemy's country was legal -

1 Bos & Pul. 345

Insurance.

8 L.R. 540

But this judgement was reversed in the court of King's Bench. Of course such insurances are void in England - & so I think would be the case in the U. States.

Lecture 3rd

2 Unseaworthiness - If the vessel was not sea-

worthy, it makes no matter of difference whether there was fraud or not. The fraud is not treated *fraus Breve Recti* by Law or Equity, as it ought to be.

When a person insures a ship & cargo, which ship is not able to perform the voyage at the time of the insurance & there is a latent defect unknown to the parties, the insurers are not liable. The principle is that the insurers are never liable for an unknown, unseen defect in the thing insured. In every insurance there is an implied contract

5 Binn. 280 2nd

Park 122-

Loing. Edor
vs
Parkinson

1 Johnson R. 241

It is said the vessel with every
acc^t which is a cargo - suffers
much of time & is left killed, & it is
not R. 20

that the ship is able to perform the voyage. This is as strong
as an express warranty. But the insurers are liable, if
a defect is occasioned by a subsequent event. If the vessel
proves defective without any adequate cause; as a great leak
without the least strain; if there can be proved to be a defect
in the building of the ship, the insurers are not liable
It will often be a question whether the defect was pre-existent
or subsequent to the insurance which can be determined
only from the circumstances of the case -
The cause must be adequate to discharge the duties, & meet the usual dangers to which the
vessel is exposed. See 1st R. 200. 2d R. 200.

Insurance

3 Illegal voyages These violate a policy on the same principle on which contract. are void at Common Law. If an insurer insures upon a vessel which he knows to be engaged in an unlawful voyage he is not liable. Courts of Law lend no aid to an illegal contract. as a smuggling voyage. It is a principle that our country will help a voyage which is illegal as it respects another. it is ~~revenue~~ a municipal regulation. Some things cannot be insured, as the

Masters & Sailors wages. It is a principle of policy to compel them to make exertion to save the vessel & cargo. There has been a practice of allowing masters to bring slaves for themselves, when engaged in the African trade but these could not be insured. Any thing may be insured that is considered as incidental or an appendage to commerce, as ports to secure against nations for the purpose of carrying on Commerce.

One point under this head seems to be, what are illegal voyages? Is trading with an enemy unlawful? on the principles of the Common Law? It has been so considered by commercial countries, & so I think it is now. altho late determinations are to the contrary. The opinion of many of the best Lawyers in England is that it ought to be allowed in some instances. In the

Book 237-
Day Blanche
vs
Hutchins-

Masters may insure their
wages, &c. &c. not.

3 Sum. 1905-
1 Mch. R. 593-

INSURANCE

design of Edward the third, it was decided (cited in Bode) that trading with an enemy's country was unlawful. In that case they determined that a licence to merchants to trade was void. The property of an alien remains so I conceive on the principles of the commercial law not to be insurable, because it is against policy - Lord Mansfield seems to make the legality depend upon the utility. His opinion was, that trade with an enemy was not always illegal (see page 68). Can a neutral in partnership with an enemy, residing in the country, be insured & recover during the war? It has been decided, that, as far as it extends to his own interest, he can. ^{Case of W. Petch.}
 It has been decided in two cases, that Insurance upon enemy's property cannot be allowed & the insured cannot recover. This decision may depend upon the principle that an alien enemy cannot bring an action but surely he can in time of peace. An alien friend can recover upon his personal contracts. It may depend upon the principle that all trading with an enemy's country is unlawful. With ^{me} I apprehend that it is not necessary to consider such insurances good. - Are wagering policies good? They are made so by Statute in England. A wagering

Ker. 317.320

L.R. 84.

C.R. 613.

Hos. Hal. 354.

6 L.R. 25.35.

3 Burr 1734.

Insurance

71-

policy is one, where there is no interest in the parties. I believe these policies are void at common law & would so be considered in this country. The before the Statute in England, it was considered they laid a foundation for an action. But I conceive it to be a settled principle of the common Law that contracts for insurance where there is no interest, are void - they are all wagering policies. In England they have been admitted to be good, because they were mere wagers, & wagers are recognized by the common Law. By 1792 they are declared to be void: & they are so by mercantile Law. This contrary to sound Law - as an agreement not to carry on ones trade - a contract to procure a match. I should say then that every contract in the nature a wager was clearly void. There was a period when wagering policies were considered as void, & other wagers was not. In 1691 it was decided that the policy was totally void - In 1692 it was decided in the same way a bill was filed to have the policy returned up as illegal & it was so ordered in Chancery. In 1710 it was for the first time held to be valid - In 1716 it was held in Chancery not to be good - But the same year, on the beginning of the next it again decided to be good - From that time to the making of the Statute they were held to be good - and in 1746 a decision in favor of the Statute -

1 S.R. 56. 2d 610.

Cowp. 729 -

3 T.R. 693 -

1 Show 156 -

2 Vern 269 -

10 mod 77 -

2 Vern 710 -

2 Atk. 1250

Insurance -

If articles insured are contraband of war, the policy is utterly void. There are cases in which the premium must be returned. Sometimes on the ground that there has been a mistaken insurance. As where a man has a ship in a foreign country, which he supposed would bring home a certain cargo; but as she did not, part of the premium was returned. I should have remarked in its proper place that articles contraband of war are, arms, ammunition, naval or warlike stores such as tow pitch turpentine, hemp flax rope & cable; in short any thing (except provisions) for the purpose of assisting to carry on the war: so horses are included I suppose for the purpose of mounting cavalry. And so are provisions when the place is actually besieged or blockaded. If a capture occur, in a vessel going to a place actually blockaded, but not declared so to be, the loss will fall upon the insurers. The policy is not void. The illegality of a voyage depends entirely on knowledge of the blockade, or of the illegality of the voyage. Of course notice is given by relations generally that such & such ports are blockaded. Hence sailing may not be illegal unless it was known by the insured. Yet he may avoid the policy after sailing by going in to a port which at the time he knows is blockaded. (But to return).

18th Nov. R. 269.

If the insured goods are sent in another vessel than that insured to be sent in, having never been on board the insured ship, as there is no risk run by the insurers, they return the whole premium. This is analogous to the sale of an article never delivered. The purchaser is not

Insurance

Cowp. 688 -

3 Brev. 1280

1 How 156 -

So in the case of a ship's having returned & the underwriter knew it at the time of the insurance - ~~this would~~ be on the ground of fraud. But if both were ignorant it would not be returned. The general rule is, that if the insurers run no risk at all, the premium must be returned; because the ground of the consideration is the peril, & where there is no peril, there ought to be no consideration. action to recover it, is assumpsit ~~and recovery~~.

If after the insurance the vessel does not sail, & the risk has not begun, no matter why she stays, the premium must be returned. There is one rule of cases, which seem not to correspond with the principle laid down - but there is a difference. The cases are those where the premium was paid on a wagering policy - the vessel went & came back safe, when the payer of the premium brought his action to recover it back, & was beaten, because the Law does not help rogues. In such cases they are both in pari delicto. This rule does not apply in every case where the parties have looked, the Law, as in the instance of oppressive ~~usage~~. Here, there may be a recovery.

There is to be no apportionment of the premium

(Douglas -
Long & Dickson

Insurance

3 Barr 1237-

144 R. 318-

Cause 666-

Douglas-

Loraine vs.

Jos. Lincoln-

when the risk has begun to run - But there are exceptions to this rule. If there are two distinct voyages, & the risk is on one only is run, there may be an apportionment; which is made according to general custom. as when a ship was insured from London to Halifax, with Convoy from Portsmouth. Had she sailed without convoy from Portsmouth there would have been an apportionment of Premium. But in case of an insurance for twelve months, & the vessel was lost in two months here the insured could not get an apportionment.

a policy may be altered by consent after the underwriter Salk 364
L. R. 22, 1st ed. 2nd ed. 545.

Lecture 4th

The Policy

The name of the Policy should be inserted in the policy in the clause by which the name of the vessel is given of the name of the vessel for the policy is made subject to the 1st ed. 312.

Date Regularly the policy should be dated so that it should be made a date in the contract the date on which the vessel was taken out to sea. The date of the policy is not to be the date of the policy but the date of the contract.

The Construction of this instrument is very important. A valued policy is where the contract is in the nature of liquidated damages is entered into for such a sum, & must be a bona fide contract. It is an insurance at & from the place where it is made. In this policy no amount into the value of the goods insured is not made. In open policies it is the sum at & from place must

Insurance

be inserted to make a valued policy. A valued policy is one when the sum agreed upon is insured. An open policy is when no sum is agreed upon is insured - but such thing is insured without valuation - the sum insured depends upon an after valuation. In open policies the insurance is made upon the value of the goods, be it more or less. The sum is not specified. A policy may be converted upon principle of Law as well as any other instruments. This however has been denied. The correction is made in Chancery. It never can be maintained when a policy is obtained, as well as for Bonds, Notes &c.

1 Atk. 455
Clark. 4

Who may be insurers? By the mercantile Law there is no restraint upon any person or persons who wish to effect an insurance. In England by Statute certain qualifications are required to be taken in the House of Exchange & London as well as in the Bank of England. What may be insured? Any thing of a mercantile nature. Bottoming Bonds must be specially named for they are not otherwise included. Losses by usage. Freight may be insured. To recover for freight it must appear that some vessel has been run down & that the goods are lost. Can profits be insured? I think they cannot on principle. The same decisions look the other way -

*3 Broom. 1894.
In such a case the right to be insured is the policy. It is not a contract, it is a right to be insured. It is not a contract, it is a right to be insured. It is not a contract, it is a right to be insured.

Clark 267 is decided by a manifest

Policy
76

Insurance

8 T.R. 13- Can a mere Trustee insure? decided that he can.

A cestui que trust, may insure, even though he was so at the time of the insurance. The property will vest without

A reasonable expectation of advantage may be insured. It is an usage in many trades, for the

captain to make repairs, & receive for payment, what is called the respondentia interest. These repairs may

be insured; on which he recovers or loses; as the ship gains or loses her port. Seamen can never

insure their wages; because it is against a great principle of policy; it is to make them exert to save

the vessel & cargo- Agents are bound in three cases, to make insurance- 1st When they have

effects of the principal, in their hands, sufficient to indemnify for the Premium - (this not at Com. Law)

2nd Where they have always been in the habit of doing so, whether they have effects in their hands or not - I doubt it

this is so at Common Law. 3rd Where the principal sends bills of lading for the express purpose of effecting an

insurance & the agent accepts them. So, I presume at Com. Law

Stam 405-
399-
422-

1 S.R. 220 cases cited.

Exp. Ab. 74, 75 T.R. 157. Indeed, where a voluntary agent undertakes to do a thing, & there is a loss occasioned by his neglect he is liable.

Dobell
11

INSURANCE

What must be inserted in a policy? The name of the person insured, the name of the ship, & the master is generally inserted, but it is not absolutely necessary. When goods are removed from the insured ship as for a leak at sea, & then lost in another, the insurance is good. What is included under the term good has been disputed. It has been held that the Captain's clothes & ship's provisions were insured under it. But this is not true. Goods lashed to the deck are not insured, under it: if they are to be insured, they must be inserted. It has been questioned if money, bullion or is insured under the term, 'Goods, wares & merchandise'. The general law is, that they are not. I cannot find any case, in which this point is directly decided. In one case, it was not directly decided, but assuredly would have been, if it had not been considered as settled that they were included. If however they are insured, they should be inserted & the value specified, to be insured. It is necessary to state the place where the goods are laden & to which

2 H. Bl. 343-
1 Durnf. 611-

4 L. R. 206
Park 20-

1 B. & C. 1996.

Insurance

Molloy Ins. 2. Chap. 7.

They are bound - also the time when the voyage commences & ends must be stated; otherwise there is no certainty. The construction of the words

2H. 236 -

"from the time she is loaded till she has performed the voyage & is discharged" has been that she goods must be unloaded in the ships own boats to make the insurers liable.

The perils to be insured against must be inserted - They are various - as against "the dangers of the sea" perils, potestates & people,

Park 24. 2 -

Thieves &c - against Piracy, means embargoes & people, means the reeling power, not a lawless mob.

5 Burr 2093 -

Beaver 313

Thieves mean pirates - I think, any external thieves.

The premium must be inserted, & the time is ought to be, because it may be returned, or there may be an apportionment. The day, month & year must be inserted -

Construction of the words of a policy

1 Burr. 348 -

The general rule is, that the construction should be liberal, to obtain the intent of the parties. The usage of Trade often points out the construction & when this differs from the literal meaning of a Policy, paid evidence is admitted to prove the usage. Where the words are literal.

Freight 179-

Insurance

1 Dem. p. 252- The arrives' do nothing more, and insects; it is meant, until she is unloaded. This must however be done without delay. Insured lost or not lost these are words peculiar to our English policies, & extend to both.

1 Talk. 443- A Ship is insured from such a place to sail with convoy- If then mine is convoyed at that place but is forty miles perhaps distant, if before she gets to that place, or afterwards is taken, the insurers are liable.

If goods receive damage from being badly packed, & this be the negligence of the owners they must bear the loss.

1 Burr 348- Duration of Insurance. It is usually considered in policies, that risk commences, after the goods are on board, & continues, until arrival at the port of destination; & also until they are safely landed - but they should remain on board, unless taken out this absolute necessity, as when ship is disabled, or at the port of discharge -

1 Burr 314- The goods should be landed in a reasonable time. Sale of goods therefore on board, insurers cannot be subjected - This however depends on usage. Freight, is what the vessel carries - when none of the freight is on board at the time of the loss the insurers are not liable.

INSURANCE

3 Dumps. 362

But when part of the cargo is on board, & the rest ready to put on board, the insurers ought to be liable.

7 Cask. 400.

6 Dumps. 475

2 St. 1205.

If insurance is made on freight to be put on board at a certain place, & the cargo has actually failed to take it on board, & the ship is lost before she arrives there, the Insurers are liable.

20 Ck. 359-

When insurance is made at & from a place & it cannot be carried, without going to another place, & afterwards lost, the insurers are liable.

1 Bl. R. 417

1 Brown. 348

4 Dumps. 206

A policy of Insurance is discharged, when the vessel arrives at the first port, if a general insurance is made.

Lecture 5th

11 Dumps. 206

Part 56

As the word Insurance is inserted, it subjects the insurers to the loss of a full cargo vessel.

As the usage of trade determines the construction, it is absolutely necessary to have a knowledge of the usage at different places. When a vessel receives damage & goes into a port to repair, the insurers are not liable for consequential damage; as for example, wages & provisions.

In general, when a technical word, has an appropriate legal meaning, there is no difficulty, but when general words are used

Insurance

1 Duff 130- in a policy, no remote consequential damage is to be taken into consideration.

Dyer vs Budgey } The time must be continuous, not detached.
(Doug.)

Marsh. 416.

1 Shaw 323.

Park 61-
62

By "perils of the sea" are meant any thing that happens by the immediate act of God, as winds, waves & Lightning, ^{lands} running on rocks, diving on shore &c. - They are not foreseen & cannot be guarded against. Altho perils may have contributed towards the damage, capture &c, yet if there is the intervention of an immediate agent it is not considered as a peril. When an insurance is made against perils, it is an insurance, not against, danger, but against the happening of events, of which danger is apprehended, & they must be distinctly enumerated - All injuries arising from bad stowage, are imputable to owners, and so is embroilment by master or mariners, where a clause was inserted to ~~save~~ the use master & mariners to make every exertion to save the ship it is at the expense of the insurers - a Policy always acknowledges the receipt of Premium, but in fact it is not so. It however amounts to proof of payment

Insurance.

Indebtedness assumption will of course lie - All it means is that when insurers are sued, they shall shall not say they had no premium - a Policy may be attained by a court of Equity when it appears to be made this mistake different from what it should be. But this power is seldom exercised & parol proof may be introduced to shew what the agreement was 544 for - the contrary to the general rule, that parol proof shall not be admitted to vary written agreements.

2 Str. 1199. Park 63. If a ship is absent beyond a reasonable time, the insurers are liable. The presumption depends on the distance & length of the voyage is time, ^{a loss by perils of the sea} The jury determine whether lost by the sea, or not. Abbott 236. If she afterwards arrives, that she has foundered. If she afterwards arrives the insurers can recover it back again. It was once thought they could not, on the ground that they could not impeach a judgment. But this is no hindrance, for the judgment need not be impeached.

2 Str. 1199. By Capture - This is a technical word, & does not extend to vessels taken & carried in, by a power in Amity, but to capture by an enemy in time of public war. The insured have a right to abandon as & for a total loss immediately.

1 East. 422. If a ship be captured & recaptured & recovered before a demand, the insurer is held only to the amount of the loss sustained at the time of the capture - and if the ship be restored after payment by the insurer he shall stand in the place of the insured. Felsh 850.

Insurance

2 Burr. 694 -

1 W. R. 313 -

Compton R. 380.

1 W. R. 191. -
St. 1250.

upon the capture & recover. This principle is admitted now, in all commercial countries. If before action brought, she is released, a recovery may be had for a partial loss.

4 T.R. 783. 1 W. R. 270

2 Vern. 176. 646.

St. 444.

Marshall 441.

2 T.R. 84. 6 T.R. 413

425. 3 B. & P. 302.

2 Burr. 696.

Detention - This includes Embargoes.

a capture after hostilities have ceased & preliminary are agreed on is only a detention. In general, any cause arising from improper detention, makes the

Insurance effected by a country -
which cannot be recovered after
a course of hostilities. 3 B. & P. 191.
4 B. & P. 407. -

Insurers liable - This extends to the time of loading.

Lecture 6th

St. 58.

*1 Burr. 252

2 La R. 1349 -

as to the policy allowing the owner
to insure of the act of the master at
his private will of not at the owner's
in 8 B. & P. 134.

Barratry must be some fraud or some
of fraud is the master of a ship
as the law by Lawrence last in 73 R. 508
St. 4129. It is the deviation is such as
amounts to a fraud, having continued on the
deviation and until insured, & not being

Barratry. By this is meant an insurance
against loss which may arise from the fraud or
trick of the master or mariners, which involves
in it the idea of criminality. It must be an injury
to the ^{or freight} owners; I must happen during the voyage
or time limited in the Policy. If the owners
are privy to the fraud the insurers are not liable. 3
But where there is a deviation, & this is previously
notified to the insurer, upon which he might have
taken up the policy, if he does not, & loss sustains,
he is liable. However when a ship was insured
from London to Marseilles, the vessel first to Leghorn,

2 St. 1173

2 St. 1264

12200574; Total Loss & abandonment.
844

INSURANCE

Genl. p. 143.
Willful deviation -

x vide 1 L.R. 252.
323.
Comp. 103.

Comp. 143, 154

4 L.R. 33 -

6 do 379 -

1 Dunn 323

As to when the deviation is to be considered as a willful deviation, see 1 L.R. 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200.

1 L.R. 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200.

1 L.R. 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200.

Not necessary that the master should derive, or intend to derive any advantage from the act done; in some cases the circumstances of the case itself may be evidence of fraud in him. 1 L.R. 126, 127.

It is not necessary that the master should be doing the act at the time the ship was lost. It is sufficient if he was doing it at the time the ship was lost. 1 L.R. 126, 127.

1 L.R. 505 -
4 do 33.

It is not necessary that the master should be doing the act at the time the ship was lost. It is sufficient if he was doing it at the time the ship was lost. 1 L.R. 126, 127.

Total Losses are of two kinds - where the whole property is destroyed, or where the whole property is lost. 1 L.R. 126, 127.

Notice of abandonment must be given to the insurer as soon as the loss is ascertained. 1 L.R. 126, 127.

This was notified to the Insurer - on his way thence to Marseilles she was lost. altho the insurer did not take up the policy, he was not liable for the loss -

Where the Captain is found ^{accidentally & ignorantly} not to be the owner of his way, it is not barratry - Barratry cannot be committed

against owners of goods, but only against owners of the ship. ^{It may not be barratry} But a loss arising from the deviation of the Captain for fraudulent purposes of his own,

is Barratry - as when one was insured from Jamaica to New Orleans, the master anchored at the mouth of the Mississippi, then stole off for the Savannah to sell his

negroes, & the ship was lost - This was a judicial barratry

So where a master having an illegal letter of marque

cruised contrary to his instructions in violation of them

the ship was lost - This was deemed barratry

if the insurers made liable -

If Captain is also owner, & insures against his own barratry, the insurance is void -

A Total Loss does not mean an entire destruction of vessel or cargo, because in certain cases, they have a right to abandon as & for a total loss, without the entire destruction -

Insurance

Average 85

12th Nov. 1167

Whatever damage a loss is incurred by any party, one part of the ship, or cargo for the remainder of the rest, no damage or loss shall be considered as a general average, but the policy to be valued in computation must be by the real interest of the assured or losses to be by the value in the policy. The policy must be considered as open policy March 5th. Hence there is no diff. between a loss & a general policy, except in the case of a loss.

An average loss is a partial loss. The prime cost is what is insured against in case of a general average loss.

There are certain expenses which are not insured against, in the general terms of a policy, they are called petty average, such as pilotage &c.

The rule for settling average or partial losses is, that they must be such aliquot parts of the prime cost, as correspond with the aliquot parts of the diminution.

3rd Brn 15.50. Ark. 114/15.18
4th Brn 783.20. 1065. Because
308.9-10. 4th Brn 1996-

When money is paid on a total loss, & it proves to be partial, the Insurers take the salvage.

Every partial loss, is not a general average loss. The last is one species of partial loss. The partial loss, is excepted in many articles.

Nov. 5th 61

also

Nov. 5th 61

The general average excepts none. If there is a partial loss upon grain, fruit, Salt, Seed, Flour, & fruit it will be a general average. Also ^{that} Tobacco, Hemp, Hides & skins, & in U. S. rum. But as to all other goods, the partial loss must be at least ^{that} but to entitle to a general average.

Exception, unless the ship is stranded.

Case of loss for standing insurer is liable for an amount for the article specified in the memorandum. No part of the loss happens in consequence of the loss, unless such average loss arises from one of the losses against. 1533. 7th Dec. 210.

This exception has been omitted for some yrs. in the Am. Cyclo. & Encyc. & Insurance Com. Standing the most probable cause of the loss. 4th Dec. 787.

3rd Dec. 18. 26. 836.

44173 -
86 -

INSURANCE.

3 Burr 1553. 750
210. 4 do 783 -

(Does this mean liable at all events, unless the loss is occasioned by stranding? It is now considered as restoring the old commercial Law in all cases whether the loss is occasioned by stranding or not - first decided by Chief Justice Ryder. The memorandum also says, "unless the loss be general" i.e. if any partial loss that is general. Here they are liable for partial losses, & general losses are omitted -

3 Burr 1550

By this is meant loss occasioned by a cause endangering the general safety of the ship & cargo -

That which is thrown overboard is called Jettison. The other articles on board contribute to payment of this loss. But if the vessel is afterwards lost, there is to be no contribution - altho she may be stranded & part or a whole of the cargo remaining be saved - If the vessel was saved, the throwing overboard is conclusive evidence of the salvation of the vessel by it. The Law requires a protest by the Captain, who swears before a Public Notary, that the goods were thrown overboard solely for the purpose of saving the ship.

Clark 116. 774 -

There is always a total loss where the salvage is not worth as much as the freight is -

Insurance.

Salvage
87-

7 SR 210

If the loss be 8000 but, but articles specifically remained, altho worth nothing, it has been held that the insurers were discharged - but this is denied -

1 Vent 196. 238.

Owners & master are liable for made by the Sailors. This case is not decisive on principles of the Marine Law.

12 Moo 63-

If goods are put into a lighter, for the purpose of enabling a ship to sail up a River to her destined port, & are destroyed, the goods on board must contribute. But if the goods in the lighter are saved & the ship is lost, they will pay no average -

It is said to be an usage in some countries, that money on board does not contribute, but in England & in this country it is settled that it does -

On ships provisions, respondents' bones, & wearing apparel there is no contribution.

2 La. R. 407-

In consequence of a storm a vessel having been ported long time to repair, the owners of the cargo, must contribute for the seamen's wages, as the detention is for the salvation of the ship -

Beauv. Ex. Merc. 146.

1 La R 393-

Salvage. This is paid when property is saved by exertions of other persons than the owners. The Salvor has a right to retain the property until the Salvage is paid. The rate of Salvage is fixed in England by Statute - Elementary writers

Insurance.

Beau. Lex. Dec. 1177.

1 Durnf. 191-

2 Burn 1211

696-

683.

No salvage due in case of recapture
by a neutral, from a friendly power.
1 John. 168

1 Durnf. 187.

4 Burn. 1966

2 do 1198-

1 Hb. R. 276

Doug. Mills vs

Fletcher - 230.

1 John. R. 335-

say it must be reasonable - at common Law, it is
one half - In case of wrecks on Land where the
parties cannot agree on the Salvage, it is settled by
magistrates on the spot by a summary judgement.
In case of wrecks at Sea, the Salvage is settled by
the Judge of Admiralty - In case of recapture, it
is said, it shall not exceed one half - It is now
in England fixed at one eighth in case of recapture
by a ship of war & one sixth if taken by a
privateer. The Insurers are always liable to pay
this Salvage, if within the limits of the policy -
which may give the insured a right to abandon
us for a total loss, as if it amounts to, or exceeds
one half of the value insured.

Abandonment. The insured may abandon
in cases where there is not a complete destruction,
& recover for a total loss. We must, before action
brought, give notice to the Insurer, that he abandons.
The insured are never obliged to abandon without
they please, but may sue for a partial loss -
They may abandon when the voyage is defeated -
where the salvage is half, or more than half -
when the expense of repairs amounts to 50% of the

Re-double Insurance 89

Insurance

over & above the value of the thing insured, unless the insurers will pay the amount of the repairs, which if they do, there can be no abandonment; when the damages to the cargo exceed this sum. If under 50 £ st. they cannot abandon; in the case of a capture by an enemy, when the insured hear of it, they may immediately abandon, by giving notice; unless they hear at the same time that she is recaptured or ransomed. Where there was a recapture, but by the detention the voyage was broken up. The Insurers were allowed to abandon & so, for any such loss as defeats the voyage —

1 Esp. N. 68. 237.

2 Bove. 1198
1061. R. 276.

Day. 230.
Keele

3 Bos. & P. 474.

Lecture 7th

Reassurance & Double assurance.

The former is permitted by the general mercantile Law but for political reasons prohibited by Statute^{19 Geo. 2}: It is when the Insurer obtains his issue to be insured. In two cases there may be a reassurance; when the first Insurer is a Bankrupt, or when he is dead, in which case his executor may re-assure. A Double assurance, is when a man gets his property insured at several offices. He can however have but one satisfaction; else it would be encouraging Gambling. The whole design of Insurance is indemnity. He may direct his action against either.

Insurance

106. R. 416- If one insurance office has paid the whole loss to
103. 1 Burr 489- the insured, an action will lie against the other
who insured the residue for the payment of its share
altho there is no privity of contract. ^{Brown 242. 1 Shaw 132.}
^{Ware 1 Burr 489. 1 B. & C. 4.}

Where there is an Insurance at two offices
on the same goods, tho for persons having diffe-
rent interests, this is not properly a double insurance

2 Str. 248- Where insurance is made on goods on board a vessel
1 Durnf 611- named, the insured have no right to shift
their goods at pleasure, yet they may do it,
when there is an absolute necessity, & the
Insurers are not discharged by their doing-
where the policy was good at first, but the
Insured do not do their imptie. duty, Insurers
are not liable for the loss - Insurance
upon rigging & provisions, as a general
rule, continues only while they are on board -
usage of trade however here regulates -

1 Burr. 341.
4 T.R. 206.
3 Burr. 1707.

The effect of a deviation is not to avoid the contract
as implied but only from the time of the deviation to discharge
the insurer from all subsequent responsibility. Hence
damage sustained before the deviation must be made good by
the insurer. But from the moment of the deviation the contract
is void and the insurer is not answerable for the loss. 1 B. & C. 4.
2 B. & C. 444.

(Deviation) This in most cases discharges
the Insurer, on the ground, that if there be
no express, yet there is an implied Contract
on the part of the insured that they will
not deviate. If they have insured against bar-
atry, the deviation will not excuse them

Deviation 91 Insurance.

A ship, when it stops at two ports, the
of deviation in the order mentioned
the policy. 6 Burr 531.
ship having liberty to touch at one port
and at another equally near. Held to be
deviation (Pro. R. 439, 440, 470.)
1 Lush. 2. 301.

of Brown's
Part 4. Cases
459
6 Burr. 531.

Strange 1264
1 Atk. 545.

1 Burr. 22.
2 Atk. 455.
2 W. 1264.
Cooper 601.

L. Taber v. Walter.
Doug.

It makes no difference whether the vessel
be lost by the means or not, or whether the
insured knew it or not. It is a deviation to go
into a port, unless the course of the voyage, or
the usage of the trade warrants it, or unless there
is leave given in the policy. The shortness
of the time makes no difference, if the deviation
has been wilful. It has been held, if it is only
for 24 hours, it discharges the insurers. Deviation
from necessity is no breach. A Deviation
arising from the act of God always excuseth.
A Deviation to repair a ship, is necessary.
In all cases the protest of the Captain is very
powerful evidence, tho' not conclusive.

A vessel may deviate to avoid being taken
by an enemy. And it is always a legal
deviation to avoid danger. It is
no deviation to go out of the way to get a convoy
in time of war. A ship at sea hearing there
was a convoy near & knowing she was much
exposed, went out of her way to get to it, succeeded,
but was afterwards lost in a storm. The Court held
that the deviation did not discharge the insurers.
The usage must be a general practice. When
necessity has forced a deviation, the master need
not go back to the old track, but must take the
nearest way & pursue it, with the greatest diligence.

Insurance

(Dung 213-

2th 1249

(Daug-
Waldridge vs. Boydell.

2nd Lab 540

24th Pl. 343

4th S.R. 162

Trading Voyages. These are not subject to the same rules. But they may go where & when they please, the ship must do nothing unusual. When there is nothing but an intention to deviate, which is never manifested, Insurers are not discharged. If it was never the intention of the Insured to go to the place specified in the policy, a hit is manifested by circumstances irresistible, & if a ship on the track to the place specified she is lost, the insurers are not liable. If before deviation, this intention is manifest, damage accrues, it has been decided that the Insurers are liable for them. But Judge Keen thinks this decision without foundation.

There was an intention to go from A to B & it was so insured, with liberty to go to C. & she is cleared out for C. & never went to C, but directly to D. Is the Insurer liable? He is. & this is founded upon a distinct principle. It is a trick to get clear duties.

Demurrage

It is commonly agreed between the merchant & owner that the former shall load & unload the ship within a limited number of days, after she shall be ready to receive her cargo, & after her arrival at the destined port. But it is frequently stipulated that the ship shall be required to wait a further time to load or unload or to sail with the convoy for which the merchant shall pay a daily sum. This & the payment to be made for it are both called demurrage. This time ceases when the ship is loaded & cleared out. 4th Mo. R. 630. Abbott 132

Abbott 178.

Insurance.

Lecture. 8th

Express Warranty. In this case, the rule is that the insured cannot recover, unless there has been an exact & literal fulfillment of the warranty. It makes no difference whether it has increased, or decreased the risk of the insured. The enquiry is never suffered whether it was immaterial or not; or whether the loss happened by a noncompliance with it - and if there is a literal compliance it is sufficient. It is no matter how good the reason was for non compliance.

There may be a representation in writing, or parol, which is not a warranty. And the Law as it respects this, is different from the Law in case of warranty. A substantial compliance with a representation, is sufficient to bind the Insurer. All warranties must always appear on the face of the policy - A writing referred to a policy, is only a representation.

It has been a question, whether the non compliance tends to increase the risk - If it does, it discharges the insurer - If not it does not. It is difficult to decide.

Park 326-

15 R 346.

31 R 360

Comp 607

2 Str. 1183

Park 184

Comp 787-

Park 182

Comp 790-

Doy 12 notes

Pl. R. 594.-

Insurance

180. 343. 1 Bump. 343-
340. 340 840 70.
180. 344. 1 Comp. 784

Writing on the margin of a policy has always been held to be a warranty (Harris vs. Harland. Kincaid vs. British. Dory)

These general rules apply to all cases of Warranty

Park 209
Comp. 343. 470.

One case rests upon a well grounded suspicion of concealment this must amount to a conviction of the man that there was a concealment.

Shirley vs. Wilkinson
Dory.

2. P. 170. 170. 170.

This a fact supposed to be immaterial to be insured yet if material in view of a concealment a failure to disclose vitiates the policy.

5. L. R. 192.

Warranty of safety, ship, particular time
Vol. 3. R. 360. 360. 360. 360.

Implied warranty. 1. Sea worthiness. If not the policy is void. 2. Ship shall not be changed except by consent or necessity. 3. Conduct & navigation according to Law - so according to Law of Nations or Treaty. - as to seaworthiness - a loss arising from internal defect of the insured, shall not insure the Insurers.

Comp. 601-
608-

Shirley vs. Wilkinson
Dory - 361.

The time of sailing, is often put in, because at certain times, there are dangerous winds & hurricanes. If you go directly out of the way to get a Convoy, it is a sufficient sailing within the Warranty.

Park 349

Warranty to sail with Convoy. This one must do, or the insurers are discharged. In England,

Insurance.

By a Convoy, is meant, a ship of force appointed by the Government for the purpose to protect the trade - (Whether any armed force in time of peace - tho the point is not settled -) They must be so appointed, because the whole success of the nation depends upon commerce - & they will always provide a sufficient convoy. Of course it must be a government ship, & appointed for that purpose or it is no convoy -

Park. 339 -
Marsh. 272.

2 Atk. 443 -
2 W. 1265 -

By departing with Convoy, is meant departing where the Government has appointed the Convoy to rendezvous - if not, the nearest place where there is a convoy -

To sail with a convoy, is sailing with it all the voyage, if possible. Departing implies this - In some cases, when the Convoy goes out of the way it is a sufficient compliance - in others it is not - If the separation is made by an unforeseen accident, it is a sufficient compliance - The true ground of discharging the Insurers in these cases, is that there is an implied warranty to go the whole voyage with convoy if possible - not that there is an express warranty to this effect

2 Atk. 443
Carr. 266 -
1 Shaw. 320.
4 Mod. 56 -
2 Bos. & A. 111.

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Insurance

Sometimes the ship is in a
convoy - and sometimes it is not
and sometimes it is in a
convoy with the convoy

In our Country it is said this construction of
departing with Convoy admitted by the Eng list
counts, will not answer - That it means they
may depart with any armed ship - But we
never have had a question on this point decided -

2th 1250

Sailing orders, are necessary, if they can be obtained

Park 393.

341-

1208 Feb. 5-

2 do - 164

Park 349 -

bank 246

1 flow 320 -

4 Burr. 1419

Davy. 732

3 1/2 P. 477.

3 Burr. 124.

Park 344.

to 10 Burr. 10. 892 &c.

The general idea is, that the ship must go from
the place to the place, & this the most direct way
& keep with the Convoy all the time if possible -
But it is sometimes the practice, after getting to
certain latitudes, for the Convoy to leave, & they
separate. This is sufficient sailing with a convoy

Warranted neutral - when may a ship
forfeit her neutrality? When she does any thing
forbidden by a nation contrary to the Law of nations.

Is refusal to submit to search & visit by a merchant
man, a forfeiture of neutrality? i.e. Is it the Law
of nations that merchantmen are bound by the Law
of nations to submit to visitation & search?
I take it to be a point that there was no doubt on the
subject until the armed neutrality entered into

INSURANCE

8 L.R. 23-

at the Commencement / am revolutionary war.
This neutrality, determines that free ships should
make free goods - Before this it was an
acknowledged truth, that Belligerents had
such a right, - (as a necessary consequence of
another rule, that no neutral nation has
a right to carry articles contraband of war)
which right has been determined to be according
to the Law of nations - He searches at his
peril, because if nothing be found, & oh he sent
into port for adjudication, the searcher may
be condemned in costs - The Italian Law
merchant is of the highest respectability - This
lays it down, that if enemy's goods are found
on board a neutral, by a belligerent, they
can be lawfully taken. The Dutch Law
merchant, is said, by Bynkershoek to be the
same as the Italian - Consigned in Consulate del mare
and when free ships make free goods it is to be an
exception to the general rule, as by Treaty
If the ship visits, she may be lawfully seized and
condemned - France, made an exception in
favor of the House of Lords not by Treaty.

Ratell -
Main right of search is

Insurance

but by an ordinance - This proves the rule,
expletio probat regulam. Russia, Sweden
 & Denmark, talked of entering into a con-
 federation to establish the principle, that free
 ships shall make free goods - i.e. They determine
 to alter the Law of Nations in this particular.
 But did not then carry it into execution. In
 1760 they entered into ^{the} combination. But England
 & France both resisted. When the neutrality
 armed, France issued another ordinance
 agreeing to it, with power to revoke if England
 refused. But England never agreed to it &
 France to this day I believe has never revoked.
 During the present war some attempts have
 been made, but they were frustrated by the death
 of Russian Emperor Paul & the attack upon
 Copenhagen by Nelson. It has never since been
 attempted. But suppose you can search, can
 you search a merchantman under Convoy?
 Clearly not. But what difference is there
 between this & the last case, in point of principle?
 If you cannot do it, the Contraband trade

Insurance

99-

may always be carried on - Right of search
is necessary on another ground - Must you not
search free ships, to see whether they are such?
otherwise they do not make free goods. In every
European treaty for a century & a half, when
this subject is referred to, it is acknowledged, as
an existing right - But the question arises,
Has any neutral nation a right to oppose
this service search, by force? Clearly not,
from principles before advanced.

A Ship may forfeit her neutrality,
by sailing without proper documents - as Registers
Sea letters, passports, Bills of Lading, Invoices - Yet
the want of these papers is never conclusive
evidence of want of neutrality - It only throws
the burden of proof upon the party - The enquiry
whether neutral property or not still remains -
they must actually sail with them, or proper ex-
cuse must be made, else the evidence will be discharge.

Neutrality is not destroyed by not obeying particular
ordinances opposed to the general mercantile
Law or Law of nations. But the insurer should inform
the insurers of these particular ordinances ^{which he knows} as well as of the facts.

Vattel. B3. Chap. 7.
See 114. Vattel also
celebrates French writers.

7 JR 405 -

Park 262. 358 -

8 JR 343

8 JR 447 -

3IK.477-

Edmund Dickinson

to Danger -

872 268

* ^{HP up} vide. 1. Hanson's Ref. 1.

Return of Premiums. In cases where the contract of insurance is void upon the grounds of non-compliance with the warranty, it is held that every payment made by the insurer cannot be refunded to the assured the assured will be entitled to a return of premium, because when the contract is void ab initio there is no recovery of the sum paid on it. It is held by majority of the courts that the assured, if the answer shall be returned in the affirmative, is entitled to 3 times the amount of the premium. See *Leach v. Ward*, 3 Burr. 1260. 1773.

8. Beavers Exp Merc:

If insured, the policy is void ab initio
if the premium of course returned. But the warranty
does not bind to the whole voyage - A condemnation
by judgment of a foreign Court is conclusive
evidence of not being neutral*. This idea is adopted

Premiums in the cases where the insurance is void as to the ground of loss with the community is trial with the community. It cannot be that it is not the Law in France - I do not know whether the assured will be a return of premium, because when the general Law merchant or not. but I do not think there is not any risk. It must be decided by the Legislature. I must not say yet the insurance shall be retained. I think it is not generally adopted. It must be per Law. May 3 Brev. 1240.

8. Brewer vs Merc - However appear on the face of the Judgment

3/4

But in cases where the risk is entire & has
once commenced as in the case of devision on that ground
that shall not be any return or apportionment (Emt. 188)
of premium (except by ~~usage~~ March 190) But if the insurance be on a voyage
which is divisible into several distinct risks & one or more have not commenced
there shall be an apportionment & return of premium in respect of the risks
which have not commenced. 3 Bovey 284 2 Bovey 330.

Lecture 9th

12th. 547—

2 do 389—

The proceeding are generally in a Court of Law - Under there is something special in the case, which requires a Court of Equity - The general rule is, that on application to them they will grant it - If a broker obtains a policy of Insurance for another & recovers on it, the employer may bring an action against him for money had & received - If a Broker is a bankrupt, he may bring his petition in Chancery requesting that he may be ordered to deliver up the policy -

Wager Policies

An Insurance being a contract of Indemnity, its object is not to make a positive gain, but to avert a possible loss. - Hence as a person cannot be said to be indemnified if a loss which can never happen to him, a policy without "int." is not an insurance, but a mere wager only. Such a policy therefore is properly denominated a wager policy.

Who contradictory authorities are to be found in the books as to the legality of these policies before the Stat. 19 Geo. 2. yet as they have been recognised as legal contracts by modern judges & as that Stat. ~~or~~ the provisions of it have not been repealed in N.Y. wager policies would be enforced in N.York.

Indeed it seems now to be an admitted point in Eng. that by the opinion of the Law of merchants & particularly by the Law of Eng. as it stood before the passing the Stat. 19 Geo. 2. a wager policy in which the parties by express terms such as the words, "at least or no interest" or "without proof of interest" disclaimed the intention of making a contract of indemnity, was then (the contrary to other determinations) deemed a valid contract of insurance: (there has however been a contrary decision in Shipp) But that a policy containing no such clause, disclaiming or dispensing with the proof of interest, was to be considered as a contract of indemnity only upon which the assured could never recover without proof of an interest.

This opinion of Chambre J. is confirmed by an observation of J. A. Hardwicke in a case which was decided before the passing of the Stat. 19 Geo. 2. Speaking of the difference between insurances from fire & marine insurances he says "in the insurance of ships 'int. or no int.' is almost constantly inserted & if not inserted, you cannot recover unless you prove property."

Lack. 556.

Evidence

Proof to support his act^{ns} must be furnished with the following proof - 1. The policy must be produced in evidence, the submission of the Def^t must be proved. 2. Evidence must be given of the interest of the insured in the subject matter of the insurance - (Insured having exercised acts of ownership in directing the loading & paying the people held suff^t 1 Def^t Stat. 14 Geo. 2. N.P.C. 207.) to two or insurance on ship & cargo. Def^t producing bill of lading & the apt to prove that it was his bill of lading & that he had the goods specified in it on board, held suff^t 30373.

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In insurance upon ships the mere fact of the possession of the insured as owners is suff^t prima facie evidence of ownership with the aid of any documentary proof or title deeds - such as the bill of sale &c - unless this is rebutted & other therefore necessary 5 T.R. 709.

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St. 1127

In insurance upon goods the mere productions of the bill of parcels from the seller abroad with the receipt to it & proof of his handwriting held suff^t.

The loss must be proved to have happened in the same manner as stated in the declaratⁿ in order that Def^t may know the case he has to encounter by evidence.

6 East 316.

In an actⁿ upon an insurance upon profits, the assured must prove a loss.

It is a good rule that nothing is held depends upon proceedings of a court can be proved by parol - Hence in cases of capture & recapture, neither salvage nor the expenses incurred in ascertaining the amt of it can be proved other than by producing the proceedings of the admiralty &c.

In an actⁿ on a policy on goods the master & owners were bound N.P.C. 84 & 2 Le D. and com^{pt}ted to prove the ship sea worthy until released by the owner of the goods.

So in an actⁿ for loss by larceny, master can be a witness to prove that it was committed by the consent & with the privy of the owners until released by Def^t.

Def^t. 406. 339.

Insurance

The action 101

The general ground that a Court of Chancery take when there is fraud, which cannot be proved except by oath of the parties is to examine them on oath. The party may be examined as to his own turpitude. It is only excused when a disclosure will subject him to a penalty. When he will not disclose his silence shall be taken pro confesso.

1444 129-
3 Bl 157-
1 Salk 22-
An agreement to refer to arbitrators, is never considered as an arbitration pending. This merely, will not oust the Court of its jurisdiction. If the subject in dispute was pending, it is a temporary bar to an action for the same thing, & if the award is made, it is a complete bar.

When an action is brought on a policy of Insurance, it is necessary to state in the declaration that the policy was made; what it contains; that it is the policy of the defendant; that a consideration was given; that in consequence of this premium the defendant undertook to insure against certain perils; that if by any of these perils a loss happens, he promises to pay. If the Insurance was made on goods state the amount of the goods. That the plaintiff was interested in the goods. That they were lost & by what means, & promise upon oath, not regarding it - You may sue for a total & recover for a partial loss. The distinguishing rule that

1 Bl R 128-
2 Burr. 904

Insurance

no paid evidence can be admitted to prove an agreement, subsequent to the policy, which shall go to defeat it - Quia non debet the contract may be given which does not go to defeat it - or which does not tend to destroy it -

The premium can never be denied to have been paid, for the policy shows it to have been paid.

Interest - goods insured by bill of lading
2 St. 1127. sold - & now it makes no difference, whether the insured have an interest in the goods or not.

After assignment of loss by capture, & on trial it is evident the loss did not happen by capture, but by some other peril insured against. Then can be no recovery - The actual loss must be specified & proved, that the Defendant may come to trial prepared -

2 Dunt. 87.
1 Dunt. 304.

Bottomry & Respondentia bonds.

There is a difference between these two bonds. Bottomry is when the Ship is pledged for the repayment of money borrowed - So if the ship is lost, the money is lost. If the ship returns safe the lender is entitled to the amount of the bond. In this case the person of the owner is liable as well as the Ship. A respondentia bond,

Insurance - ag^t Fire

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is a loan upon goods, not upon the Ship -
If the goods get to market safe the pledger pays the
bond. If they are lost, pledgee also loses his money.
They are both contracts of Lazard & exempt from
the Statutes of Usury -

2 Bl. 257 -
Holt 11 -

The master may pledge the Ship, but
an agent or factor cannot.

Perm. 263

Cap. 421 -

The Lazard, in these cases, prevents the contract
from being usurious. If money is taken up &
no Lazard is run, the lender can only recover
the sum lent, with legal interest. These bot-
tommy bonds may be insured. The bottomry bond-
man is never entitled to salvage because the loaner
of the bond is that she shall return home safe & sound.
She is not liable to general average. The property is not vested. It is
a contract specie generis. The bottomry bondman
is a respondent. man nam loth a lien upon
the ship or goods while they are safe -
If the vessel is destroyed by fire, if the master
or owner, the bottomry bondman does not lose his

2 Wils 263 -

3 Brown & Paul v. Lane 1817.
2 Atk. 544 -
Marsh. 681.

money - ^{the usually provides of fire & lightning by deviation & mutiny &}
Insurance against fire. Usurper power
is not found in a mob. This insurance extends to
expenses arising from moving goods out of a house on
fire. He would not have an interest in the property or ship
sinking. These are strictly assignable, but the parties

Insurance

may make them so. There is no return of premium in the case

Lecture 10th

March. 1844.

Insurance on Lives. This depends upon the principles of mercantile policies. No person has a right to be insured on a life, in which he has no interests as being creditor to a man, holding an estate *per autre vie*. But a creditor has such an interest in the life of his Debtor, that he may get it insured - The exceptions in these policies are always the same - Suicide & Death by command of the Law. There is always a warranty that the person insured is in good Health, & generally that he is of such an age - Health & good health are always the same, & mean, as Lord Mansfield says, reasonable good Health. It is no breach of the warranty that the

1 Bl. R. 312.

One may insure the life of his Debtor if he has only a personal security. Park 432 per Lord Kenyon. March 1833. - S. But the Debt must be a legal one. Park 1208. 151. Park 431.

person insured has a particular infirmity, which will not carry him off, unless connected with some other disorder. There is to be no return of Premium because the risk commences immediately upon the execution of the policy

Insurance

Charter Party

A Merchant agrees with the master of a ship to carry his merchandise to a certain place in safety, for a sum which is called the freight.

The contract is generally made with the master, altho, he may have no interest in the vessel. The instrument is executed under Seal & real. There is not a thing as hiring a vessel without chartering her, as when you hire a vessel about which makes the hire in a sense the owners. But this we are not to consider at present. The common rule is to carry for so much & ton. tho it may be in gross. In some cases there is no agreement at all, but the usage of trade settles it. Notwithstanding this contract entered into, notwithstanding there is an agreement duly entered into to pay so much, yet the freight often depends on the success of the voyage. If the ship is lost by the perils of the sea, the freight is lost. When there is a stipulated price for the outward homeward voyage, & another for the inward, if the vessel is lost on her return, the freight on the former is to be paid, but not on the latter.

Charter Party

2 Vern 212-

1 Sid 236-

If there is an agreement to bring back certain articles, & he does not, yet he shall have the whole freight, if he was guilty of no fault or negligence. But if so guilty, he shall not have the freight.

By the Law Merchant, the money due for the freight is to be paid at the port of delivery & the agent of the freighter is to be paymaster. The master is not obliged to deliver the goods until the freight is paid. He has a lien upon them. When a vessel returns into port, to refit, the master is allowed a reasonable time to refit & again to proceed on his voyage - or he may send the goods by any other vessel he chooses.

2 Burr 882-

When by stress of weather the goods are damaged & many lost, the merchant if he takes them, must pay the whole freight, but he may if he chooses abandon the whole & pay nothing. He must always abandon all, or else pay the whole freight. If a ship is captured without fault of the master, the owner shall be entitled to freight pro rata. Universally the owner of the ship,

2 Burr 882-

Charter Party

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as well as the master is liable to the freight.

When a bareboat contract is made, & earnest given to him it, if the merchant does not load the vessel, he may forfeit his earnest & pay no damages. So if the master fails, he forfeits the same. In a Charter party there is a covenant on which you

Hardw. 85

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can see & recover damages. For however the freight suffers the master & owner are both liable in an action at common law & no enquiry is made whether the freight is to go to the Captain or owner.

If the master purchases necessaries for his vessel & the credit was given solely to the owner, & seems

Hardw. 346

the master is not liable. On a voyage, if there are many owners of a ship & a majority of them direct the voyage - all are liable for the outfit, &

Cart. 27

all are interested in the profits. If some declare their dissent & disapprobation, yet the voyage must proceed, & the majority go to the Court of Admiralty & give bond that they will pay the shares of the minority if the vessel is lost. If the master makes a good voyage, the minority derive no advantage from it, & no premium for the use of the ship.

Seamen's Wages

If a seaman is engaged in open debate, i.e. a trouble some fellow - They may discharge him take his venture (if he have any on board) & deprive him of half his wages. If he uses weapons he may be confined on the spot. If he enters into a conspiracy it is Death. They are entitled to their wages by the Lease merchant at the point of delivery - & an agreement to the contrary, will not be enforced by the Court. If a vessel is lost, the sailor loses his wages - The general custom, is to pay when the vessel returns & the sailors are discharged - If a sailor refuses his duty on board he is liable to lose his wages - He is obliged to remain on board until the vessel is discharged & unrigged, if that is to be done. When arrived at a place where there are not a sufficient number of porters or carriers, he is bound to become such & is paid for it - But a promise to him by the Capt. of extra wages for extra service in time of danger is void.

When however a ship was captured, the cargo condemned & the ship detained to rebuild it, the promise by the Capt. to the sailors of so much a month to prevent their leaving the ship was held as void as the ship was detained a long while.

1789. 1st Lid. 179 -
3 Burr. 1584

* See in the matter of Wages 2 Row. 253
2d. 358.
case of freight & the freight is carried
the sailor is entitled to his wages up to
the time of the first delivery of the
cargo - 12 R. 139

See in N. S. 42.

1st 405.
17 R. 73. P. P.

Seamen's Wages - Passage money via East 316.

A sailor being compelled to leave the ship thro' improper treatment of the master or being dismissed without lawful cause will not be deemed desertion. 3 Esp. N. P. C. 259. do. 72.

Where a sailor is impressed into the Royal Service he will be entitled to receive a proportion of his wages up to the time of impressing 2 Ld. R. 1211. But nothing further Abbott. 395.

So the ship he lost after the first port of delivery the sailor then lost only the wages due after leaving the last port of delivery 1 Ld. R. 639. do. 739. 12 mod. 409 L. C. 8 East. 300.

Where a ship is seized, carried in & the crew marched into the interior & there detained for a long time but the ship at length being restored & having returned with the crew & cargo & so earned her freight it was held on that the seamen should recover wages for the whole time — 4 East. 546 & 561. 2

If a seaman can prove that he was disabled from performing his duty by accident, he will recover wages for the whole voyage in like manner as if he had actually served — But see remarks of Grove. 2. 6 T. R. 325. 2 H. Bl. 606. 2.

A seaman who is impressed before the ship returns to a port of delivery is entitled to wages pro tanto. 2 Ld. R. 1211 & Holt. 81. 6 T. R. 320.

But if he contracts to go from A to B & back again with a stipulation not to be entitled to his wages till the end of the voyage, he cannot maintain a genl. indebt. ass't. to recover pro tanto as far as B tho' he were there wrongfully dismissed by the S. P. M. that ass't. but his remedy is either for the breach of the special contract, or for such tortious act of the Capt. whereby he was prevented from earning his wages. 2 East. 145. 4 Esp. R. 774 L. C.

with a few more

Merchants company

By the common Law, when they are joint tenants they have the *jus accrescendi*; that is, if one dies, the survivor has the whole property. This is not the case with Merchants in company.

The property of one, goes to his Executor. Here there is no survivorship of property.

Co. Litt. 182-

The right of living alone, belongs to the survivor. & the action must be brought in his name & not in his & the partner's executors. Every thing else that partner can do, the Executor can also do. His discharge is the discharge of both.

Lecture 11th

Wes 265-

Merchants in company are individually liable for their Company debts, & if one dies, the surviving party must first be sued, & if the execution is ineffectual, then & then only the executor of the deceased may be sued for the Company debts.

The general proposition is, that one partner is bound by the contracts of the other. This must however be understood with some limitation.

It must be in all matters within the scope of the partnership & always respects personal property.

Merchants Company

It does not always follow that if A & B are partners, & B signs a contract in the name of the firm, from the face of the contract that both are bound by it - whether it follows that if one makes a contract that may be beneficial to the other, that both are bound - is a particular usage & then trade to make contracts for real estate, the signature of one, is the signature of both. This usage must be proved, to bring it within the scope of the partnership. Lands cannot be purchased in the name of the firm, as of A & B, but in the name of both - they are tenants in common. The purchase may be made by one & signed by one, & yet both be bound; as when the property went into the company & was exposed for the benefit of both. In this case the action can be brought against both, & the particulars stated. And it is to be remembered that what is within the company trade, is not governed by the secret articles of the partnership.

Merchants company

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Dissolution

When the partnership is dissolved both are bound with regard to sellers, until the dissolution is made public. Yet if the seller knew of the dissolution he cannot bring his action against both: & the rule is, that if reasonable means are made use of, to make known the dissolution; if it becomes a matter of notoriety, & the seller might have known of it, then if he did not, he shall have no action against both -

Bankruptcy

In the case of a partnership, the partners are bound to the extent of their Company property & their own private property. In the case of an Insolvency this rule does not apply. Asks are both bankrupts in every respect. The rule is the company property goes to pay the company debts, as far as it will. The private property of one goes to his private debts & the private property of the other to his private debts. Then the private property of one pays his private debts.

Bankruptcy.

If a residue is left, the Company creditors have a dividend of it. They both have a residue of their private property the Company creditors have a dividend of both - When both are bankrupts in private property & a remainder is left of Company property after paying Company debts, private creditors shall have it. A's private property can never be taken to pay A's private debts. When there is a long of execution on Company property, one undivided moiety is sold at the Court, & the purchaser & other partner are as respects this tenants in Common

Factor

vide also title Indentment & Vt. 3.

A Factor is a person employed abroad to sell goods for another, & is paid by a salary or by Commission on sales & purchases. A factor as it respects himself must pursue his commission strictly. If he is ordered to sell for cash only, he cannot sell for credit unless a particular reason exists, as when goods are perishable &c. The factor binds his principal, yet he cannot pledge the goods for his own debts & make them liable -

8th D. 539-

2th. 11/8

11/8

The usage of trade must be considered - as where the principal orders the debtor not to pay the Factor, he is bound by the prohibition. Where a Factor pursues his commission & loss happens, the merchant is liable; & where he does not pursue it, he is himself liable & by the Law merchant he loses his factorage a case where the factor exceeded his commission by purchasing goods the merchant made a formal disclaimer, yet took them, & being asked threw them upon the factor, & set up as a defence that he took them as the factor's factor. If factor sells to one whom he did not know to be insolvent he is not liable but if he knew him to be in failing circumstances he is liable. on the common Law is ever that every man must act reasonably. When the factor sells his own goods, those of his principal & debtor able to pay but one, the rule is the principal shall be paid. It is a very common thing for a factor & him orders to effect a business to be himself an broker & without filling a policy charge a premium in his books this makes him liable - The factor has a lien upon the goods in his hands.

1 Nov. 309 -

2th 182 -

2 Dec. 239 -

4th Dec. 489 -

Prize & Prize Courts

Belligerents cannot establish prize Courts in a Neutral Country, nor can they make any sale of their prizes there, unless authorized by Treaty.

The property in goods captured cannot be transferred so as to divest the right of the original owner, unless after a sentence of condemnation by a court of competent jurisdiction.

The Ct of the Sovereign of the captor is the competent tribunal to decide on the validity of captures.

Prize Courts in
Neutral Countries

Prize courts proceed in rem & cannot adjudicate on a prize lying in a foreign port, or out of the jurisdiction of the Captor or his ally.

Cts of Com. Law, tho they cannot enquire into the direct question of prize, may in a question of property decide whether the condemnation or sale has been made by a Ct of competent authority.

Bills of Exchange

Lecture 12th

A Bill of Exchange is an order letter of request written by one man to another, requesting him to pay a certain sum to a third person. It is generally expressed to be for value received. The forms are different but they are all made payable to — or order or to the bearer. On the face of the bill are three persons, 1st The Drawer, the person who draws the bill. He never changes his name. 2nd The drawee the one, on whom it is drawn & 3rd the payee, the one to whom the money is payable. There may be more concerned in it. If the payee endorses his name ^{by blank}, he is called the endorser & he to whom it is endorsed, the endorsee. If the Drawer accepts the bill he is then called the acceptor. In promissory notes there are two persons, the maker & the promisee. If it is payable to — or order, it is negotiable. When once negotiated, it possesses the qualities of a bill of exchange — I think, or order is essential to make it negotiable in the U.S.

Bills of Exchange

1 Salk 129
 2d R^o 157

It has always been the settled opinion of
 Lawyers that by the Common Law notes
 were not so far negotiable as to give
 the Holder a right of action in his own
 name. And the question has been decided
 in the Court of Common Pleas & King's Bench
 Judge Penn doubt the soundness of the opinion.
 In Vermont they have made their notes
 negotiable on the principles of the Common Law
 tho they have no Statute on the subject. If the
 Bill is not endorsed, the Holder can only
 recover of the Drawer or Acceptor. When a
 Bill is made payable to B, or order, if he sells
 he must endorse, but if the Bill be payable
 to bearer, there need be no endorsement. ^{2 B. & W. 1516}

1 Str. 441

1 Bull. 241

3 B. & W. 667

2 B. & W. 1235

Every endorsement strengthens the security &
 the Holder may sue either the endorser or acceptor
 or Drawer. He may sue the last endorser at Common
 Law because there is a privity of Contract between
 them.

Whitby 141

It is a presumption of Law that the
 Bill has effects in the hands of the Drawee, & it
 may be removed. These Bills are made payable
 when the parties agree - sometimes so many days after date

Bills of Exchange

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10th. 15
Chitty 142-3.

12th. 281-
Hec. 829-

Where a day is fixed for the person who is to pay has a grace the same as in the case of a bill drawn on a bank to allow them time to collect the money. Days of grace not allowed on bills payable on demand. Chitty 146. Hec. 829. at night. See also Chitty 144-5. A person declared that it was. See also 12th. 484.

12th. 30
6 mod. 29-

12th. 124. 12th. 757.

12th. 82. 146.

12th. 125. 200. 301-

When payable at usance it means payable at that time which the usance of each place has established. In mercantile proceedings, from date & from the day of the date mean the same thing, & both exclude the day at Common Law. But it is said the date includes the day of the date excludes the day. Judge Renshaw thinks there is no ground for this. The day is the day of the date. The month is to be regulated by the rate where it is drawn not where it is payable according to elementary writers. There are three days of grace allowed in this Country & in England. But the days are different in different Countries. Bills payable at sight have no days allowed.

At Common Law when a note becomes due on Sunday, it is payable on Monday, by the Law Merchant it is payable on Saturday.

Foreign & inland Bills of Exchange are placed nearly on the same footing. A bill drawn on a person connected with a Foreign Bill. Promissory notes are of modern origin: at Common Law they are not negotiable - they were introduced in the room of bonds.

It was formerly held that no person could draw a Bill of Exchange but a merchant. This is now exploded. A person who can bind himself by any other contract

Bills of Exchange

- 2 Vent. 292 - is bound by a Bill of Exchange. A minor is not
 1 Lyd. 17 - bound by a Bill, but an indorser is, if over 21 years
 1 Lev. 86. Durnf. 40. - a minor is bound only to the payee on a Bill for
 necessities -

A Female Covert can draw a Bill
 of exchange as well as any other person, provided
 she lives separate on a contract made by her
 husband contracting that she might so live -

It was formerly doubted whether if one joint trader
 accepted a Bill the other was bound - it is now settled
 that he is bound, unless proved that it is a mere
 private concern. The presumption is that it is for a
 joint debt.

1 Salt. 126 -
 Gilbert's Law of Evidence
 117 -

Bramesley M. 462

One may authorize another by power to sign
 his name to a Bill of Exchange, 12 mod. 884.
 That a Bill is void in such an alter and
 1 Inst. 520. But care must be taken
 to sign as atty for 355. 5 Inst. 148.

2 Boum. 676.

A Clerk who has been accustomed to
 accept Bills binds his master. The general rule
 is, that Bills of Exchange & promissory notes are
 on the same footing. But there is a difference
 in the terms. The maker of a note & the acceptor
 of a Bill of Exchange are the same persons. The first
endorser of a note & the drawer of a Bill of Exchange
 are the same persons. In other respects they agree.

Payable to the order of B is the same as to B
 himself.

Earl H. 402

10 mod. 286. 21 Nov. 23

It was formerly doubted whether a Bill
 payable to bearer only was a negotiable Bill.

Bill given aft. State of Gaming & Usury -

Bouyer vs
Bampton.

In Str 115 It was holden that an innocent indorsee for a valuable consideration without notice could not maintain an action on a promissory note given for money knowingly lent to game with at dice - on the authority of this case.

Love et al. vs
Wall.

In Doug. 435 it was holden that the indorsee of a Bill of Exchange given for an usurious consideration cannot maintain an action upon it against the acceptor altho the indorsee has given a valuable consideration for the bill & is not affected with notice of the usury.

1 Bosh. R. 92 -
1 Rep. N. O. C. 274.

But that of Usury applies only where the bill is originally given for an usurious consideration; for if fair & legal in its inception an indorsement by payee for an usurious consideration will not avoid it in the hands of a subsequent bona fide holder.

Doug. 632 -
Pearce vs Rhodes
3 N. O. C. 3

6 T. R. 61 -
7 W. 630. 431.

Where the illegality of the consideration does not toll within the State of Gaming & Usury the holder is not affected by the transactions between the original parties, unless he had notice, or took the bill after it became due from a person who had notice of the illegal consideration for which the bill was given.

vide
page 38

1 H.M. 313.

Regularly a bill of Exchange ought to be made payable to a real person; but if it be drawn payable to a fictitious payee or order & indorsed in his name by concert between the drawer & acceptor, it will be considered as a bill payable to bearer, & may be declared on as such in an action by an innocent indorsee for a valuable consideration of the drawer or acceptor. See *vice contra* *Cypr* 1 P. 140. 598. 826. with whom *Thomson* Chancellor concurred.

Regularly every Bill of Exchange ought to be dated, but a date is not of the substance even of Deed; for if it want a date or have a false or impossible date as the 30th Feb^y yet the Deed is good. *Godwans* case 2 Co. 5a.

In 2 Show. 422 the date was omitted in the declaration on a bill of Exchange the *Pl* said they would intend the bill dated at the time of drawing it.
& in 3 Bos & Pul. 173 the same principle is recognized.

In 4 T.R. 320 is a case of a bill which was altered in its date after acceptance while in the hands of the payee by some persons unknown to any party, it was afterwards endorsed to *Plff* who did not at the time know of the alteration: in an action as acceptor, bill was held to be void; judgment affirmed 2 H. Bl. 141

But a mere correction of a mistake, as by inserting the words "or order" - furtherance of the intention of the parties will not vitiate a bill.

3 Esp. N. D. C. 245.
per *de* *Blanc*.

Bills of Exchange

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2 Nov 8. 1 Bl R. 435.
 3 Bl R. 1516. 100452. 3d Bl R.
 1537. 2 do 1031. 1 Bl R. 435.
 Co Litt 214. 1 Bl R. 26. 619.
 2 La R. 958. 3 Bl R. 213.
 2 Bl 442. 3 Bl R. 1521.
 2 St 1271. 1151. Buller's
 (X.P. 272-3. Ramm v. Ramm
 - Luf. Doug. 1 H. 59.
 10 mod 294. 316. 2 H. 59.
 2 La R. 1361.
 3 Wils 207. 1 H. 1212.
 1 C. 2 Bl R. 752. 59.
 Coups 571. 1 Bl R.
 11681. 1545. 1563. 3 Bl R.
 on 1336.
 2 H. 1157. 18024
 629. 1 Bl R. 323.
 2 La R. 1394. 336. 1361.
 8 mod 363. 4.
 2 H. 1217. 1 Bl R.
 227. 1 Bl R. 262.
 2 H. 1212. 1 Bl R. 5
 2 La 1256.
 Harrow 25
 Laidr. 288.
 2 H. 1211. 1 Bl R.

But it is now settled that it is recoverable by the
 bona fide holder when the bill is payable to
 or order, it cannot be transferred without indorse-
 ment but one payable to bearer passes by delivery.
 When there is a specialty, (ie.) an instrument under
 seal you need not prove a consideration. But
 notes not sealed must be proved to be given for a valu-
 able consideration.

Qualities of a Bill of Exchange & promissory note

1st It must always be an engagement or debt to
 pay money. 2nd There must be a personal credit
 in the drawer - not payable out of a particular fund.
 Notes of Land are good however the payable out of a par-
 ticular fund. 3rd It must be payable at all events
 not depending on a contingency. but if the time
 is certain the contingency must take place. it
 is a good bill - whenever there is a moral
 certainty it is a good bill. How far the
 Common Law operates may be seen in 2 Bl R
 1072. The phrase "value received" in a
 Bill of Exchange & promissory note
 made negotiable, need not be inserted.

The word "order" is ~~not~~ necessary, &c. 1 Bl R.
 between indorser & indorsee. 2 H. 133. between them it is not necessary
 but it is between indorser & drawer - Ramm. & 12 mod 310. 5 Bl R. 276.

Bills of Exchange

Lecture 13th

*The people of the State of New York
diligently should be used in this case for
acceptance. 9. Stat. 24. M. 549.
What Due Diligence is made
6 Stat. C. 3.*

The acceptance of a Bill

An acceptance is an agreement to pay according to its tenor. This may be by writing, or by parol. The latter however is more difficult to prove. It was formerly much contested whether a parol acceptance was binding. It was supposed to be otherwise by the general clause of the Statute against Deceits & Frauds which enacts, that no parol agreement to pay the debt of another shall be binding. And it was supposed that C. undertook to pay the Debt of A, & the promise supposed to be made to B. But the argument is evidently fallacious. The promise is not made to B, but to A himself. Consequently it

Bay. Sup. Nov. 74. 16. July

2th 648 — 1000.

2nd 1674 —

1663 —

is out of the Statute. But is it not a nudem pactum?
I then any consideration proved? The Law always presumes that C. has effects of A in his hands and if there was no consideration, A could not recover of C for not paying it but B could because there is no such thing as a nudem pactum.

Bills of Exchange

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by the mercantile Law between third persons -
 An acceptance is ordinarily written in the back
 but it is not necessary. It may be done by
 letter. A promise to accept, is an acceptance
 between third persons - An acceptance may
 be before the Bill is issued ^{or after it is drawn} & all. A writer
 to C & asks him a letter I will accept
 a Bill in favour of B if drawn on him
 C writes back in answer that he will -
 If this letter can be produced it will bind C as an
 acceptor. The Bill may be accepted after it is due
 & then it is accepted according to its tenor - It may
 be accepted by any body else, for the honor of
 the Drawer, & the acceptance is binding - The
 acceptance will bind the acceptor to pay to whom
 soever he has been payee, indorser or indorsee -
 If any person has been induced or would prob-
 ably be induced to lend money on the promise
 of C to accept a bill if presented it binds him as an
 acceptor This is often said to be with a covenant &
 Now suppose C has no effect in the hand & yet
 he writes to C & asks him whether he will
 accept a Bill which he may draw in favour of B

Harow. 75 -

1st. 648 -

10th. 715 - or 611.

5 East. R. 520. 54.

In all these cases the bill was on edge
 at the time of acceptance - for a promise
 to accept a non-existing bill has been held
 not to amount to an acceptance. 1 East. R. 98.

Cart. 459.

3 Burn. 1663 -

Salk. 127-9.

10th. 364 -

544

5 East. R. 520 - 449-5.

Peawes Lex Merc.

456. Comf. 5723

Douglas - case of

Mason & Hunt

Peawes Lex Merc.

454 - 481 -

Bills of Exchange

He writes back, he will. Now is this promise binding? The rule of decision in this is - If the promise is attended with any circumstances let them be what they may, which induces a

Book. 572. 574

10th 7/15-

Day 286. 14th 1847.

third person to take such a bill, it binds him as acceptor - If there are no such circumstances it stands as at Common Law, a mere indemnity.

There may be a special acceptance & unless the payee gives notice as the Law directs it binds only the acceptor not the Drawer. If acceptance to pay some time after that mentioned in the bill, it binds him, but notice must be given to the Drawer in order to bind him also -

It may be accepted to pay at a different place to pay half goods & half money & it is binding in these cases, due notice must also be given to the Drawer - There is one decided case in which could take nothing from the acceptor, unless he took the whole. This idea is now exploded -

It is a bad argument to come from the mouth of a Drawer -

1 Change 214

Bills of Exchange

An acceptance may be conditional as well as absolute, and when the conditions are fulfilled it binds the acceptor, & he must observe the condition in the acceptance - a number of

See 648 Durnford cases have been started as to what is a conditional

See 1. 571 - acceptance - If he writes "I accept this Bill," a.
See 1152 648 verbal condition will not excuse the acceptor,
Balk. R.S. 271 - as to the incourse tho it will a betwixt the
Doug. 286 - drawee & payee - too do how queer!
Doug. 182 -

What is an acceptance?

See 1. 571 - an agreement to accept may not be an acceptance
may be used but in such words as to put a third person in
like condition than the drawer, & this third person
will have nothing to do with the original circumstances
and might subject to some drawer's action
See Doug. 182 in Doug. 347 & 348 571. Balk. R.
1. 4670.

Almost anything written on the back of a Bill
is an acceptance - so "I present" or "I see" is an
acceptance. No particular form of words is necessary -
In Litchford's case a Bill was presented to the drawer
with "I accept this Bill" an action was brought for
non-payment & the Court subjected the drawer, on
the ground that he could not sell the word acceptance
a direction to a third person to pay, it is an acceptance
but if a man accepts a Bill to pay at a different
place, as I accept the Bill, provided I shall pay it
he must go to pl. & make the demand if he does not
he the action will lose it -

2th. 1195 =

Bills of Exchange

If the Drawer says, "leave this bill until tomorrow & then I will accept it" it is a good acceptance.

Gilbert Law of Evidence the Question if I was the intention to accept
118 - (Sum) 269 - But if he says, "leave this Book & I will look
Dewees L.H. 445 over the accounts & accept accordingly" this is
3 Bac. 610 - no acceptance.

Bull. N.B. 270.

Drawer endorsed "I will pay to the order of B" & then
he is good acceptance.

But if on the Bill, the Drawer writes
I pay the contents to C - this is a good acceptance.

It seems a Bill upon C requesting him to pay
on account of D - C draws upon D and refuses
this is no acceptance. 3 Bac. 1163 is a case

of great celebrity - Where a person undertook to
accept a bill - & intending to give credit to B,
wrote to C, & return - He will accept his Bill drawn
by him on B's account (pro hoc postea)

Lecture 14th

Transfer of a Bill of Exchange

3 Bac. 1526 -

1 Hb. R. 485 -

Dough 6117 -

Angell - Langstaff

496 -

A Bill is drawn payable to B or order. This
is effected by the payee's endorsing on the back
of it - This endorsement may be in full or in
blank - It is in full when it is endorsed "pay the
contents to B" In blank it is made payable to
any one who holds it - D has all the power that
the payee has & can endorse it in full or in blank.

Bills of Exchange

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- The moment a bill is endorsed blank, it becomes transferable by delivery. It has been made a question whether if the drawer draws the sum blank & it is filled up by the payee, he is liable - He is so bound because he places unlimited confidence in the payee - Transfer without endorsement does not add to the security of a bill - The blank endorsement is equivocal - It does not certainly mean a transfer of the property - It is true the indorsee may make it so by filling it up. & it is not necessary that it should be so filled up - A power of attorney may be written over it - you can write anything over the name which refers to the bill - But you cannot draw a distinct agreement. It is either a transfer, a power of attorney, or a receipt. you cannot limit the power of the holder to endorse. The endorsement follows the nature of the note. It is payable to order & endorsed without the word order, it is still negotiable. - A decision the Italian courts. This has again been agitated in late times. No evidence of what the Law Merchant is, is admissible. But the custom of a particular place may be admitted. If a bill is endorsed by a minor it is only voidable as to him. It binds the drawer & subsequent endorsers.
- Salk. 125-8
2 La R. 871-
1 Phos. 163-
Bl. R. 295-
2 Burr. 1216 & 26
Salk. 130-
Conyer 311-
1 K. M. 88-
3 D. R. 754-
1 H. 457-
2 Burr. 146^{on 126}-
1 Bl. R. 294-
2 Burr. 1227-
Doy. 617-
1 Burr. 452
3 D. 1516.

Bills of Exchange

1512 485

1 La R^e 360.

Canth 4/6 -

rent 309

Leaf 65-

Doz. ⁵⁵ Kilgus

Mayor

Pr. 449

mai St -

in Nov. 44!

494

Sept. 1921

Dep to H.

Pr. 516-

3 wils 5-

Bill's stolen or lost may be recovered by the bona fide Holder. The endorsement must be & has endorsement of the whole Bill - When the legal title is in one & the equitable title is in another he who has the legal title must endorse - Transfer of Choses in action are criminal - This implied in the contract on the part of the Drawer 1st That the Drawer is capable of binding himself 2^d That he is at the place where he is said to be, or some person to act for him. 3^d When presented, he will accept. 4th When due he will pay it. 5th must however do his duty - i.e. the duty which the Law requires - the moment default is made in either party a right of action accrues. The engagement of the Endorser is precisely the same as the Drawer - Nothing discharges the Bill, but the payment of the money - If the execution proves ineffectual against one, you may sue the other. The baux is nothing but a suspension of the right of action

Bills of Exchange

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If the afterwar's marries, the Husband must choose
for being personal property it belongs exclusively to the husband

An Executor or administrator may endorse
over a note or bill of exchange, for the whole
property is in them; & the note or bill is in its nature assigned.
So a note or bill of exchange may be endorsed to an
executor or administrator as such, & he runs under such.

NR 477-

A Drawer a bill upon C in favour of B. B indorses
it blank to D who presents it for payment. C
refuses to pay it, or delays the bill - an action
of Debt will lie in favour of B against C. D is a
competent witness to prove the fact, because it can
not be proved that the property in the note was
assigned to D - it being only a blank endorsement.

If the indorser has received part of the money on a
bill of exchange, he may nevertheless have an action ^{against}
the Drawer for the whole amount of the bill, & indorser
has his remedy against the endorsee for so much
as he has paid in

Bills of Exchange

Lecture 15th

Duty of the Holder

* i.e. due diligence must be used 27th Nov. 589.
Whether this has been done or not is a question of
Law dependent on facts - such as situation of the
holder, their means of knowledge or contact (R.B.)
makes no diff. who gives notice to the drawer
of dishonour of the bill. Chetty v. Bills 98.
And see 4 K. 2 179. notice that in the case
of notice of the drawer not directed to come in Ch.
Beloe v. B. 287 etc.

Bills ought to be presented in due season.*

The time depends upon circumstances. But in
cases of Bills payable after date, it has been
held that if presented any time for acceptance
on or before the day when it becomes due, ex-
cluding the usual three days of grace, it is suf-
ficient to bind the drawer. ^{but see marginal note} In all cases of

5 Ben 2671 -

Dumf 713 -

do 712 -

foreign & inland bills, notice of non-acceptance
must be given to all persons to whom the holder
intends to look for payment. There is a particular
rule about giving notice which must be attended
to. Barely giving notice that the bill is dis-
honoured is not sufficient - notice that he
shall look to him for payment is also necessary.
The reason of giving this notice, at common
merchant Law is different - is the former
because these persons ought to be acquainted of
an action brought against them which they
did not expect. In the latter, the reason is

Bills of Exchange

129-

1 La R 743 that the drawer may take his effects out of the
 drawees hands, which the Law presumes he has
 Stouge 829- there - the same notice must be given in case
 of non-payment, as of non acceptance - The
 Beames Lex M. 461- presentment must be made in the usual hours

of business, according to the custom of the place
 2 M. R. 747- & the same notice must be given if the drawee

Post. 46. C. 262 If a bill was non-suited
 because it appeared on trial that the drawer
 had been accepted on day preceding last as absconded or is not to be found - This notice
 of grace.

where the parties live at a distance from each
 other, is to be given by the next mail, or regular conveyance 24 M. 585
 This is called oftentimes in the books a convey-
 ment opportunity

(Dunf. 169- Bills, when the parties live
 in the same place, if dishonoured, require notice
 in a reasonable time - what is reasonable must
 be determined from the cases - as Th. In this case
 two days had elapsed after being dishonoured, &
 no notice given. The Drawer was not liable -
 There is but one case in which the time adjudged
 reasonable exceeds 24 hours, & that depends upon
 particular usage - as where it was proved to be the
 usage of the London bank company, when they received

24 M. 585.
 6 Post. R. 3.

(Dunf. 169)

2 M. 461-

reasonable exceeds 24 hours, & that depends upon
 particular usage - as where it was proved to be the
 usage of the London bank company, when they received

Bills of Exchange

bankers notes, to send them next morning for cash to the Bank, which cash was made up in bags & called for by the clerks in the evening - Payment was made to them by three o'clock in the evening of two notes - next morning they were sent to the Bank left there as above, & the Bank stopped payment just before the clerk called in the evening - It was adjudged that the loss must fall on the defendant, tho' the money might have been received in the morning, for the Company had only acted according to usage - 2^d Received at 12 o'clock & presented the next day at nine - this was considered reasonable. 3^d a note was received on Saturday.

St. 4/5 -

Orange

On Monday it was sent out, but not called for until evening. This was held unreasonable - 4th A note was paid to B at 12 o'clock & sent immediately to the Bank. At 10 o'clock next day the Bank sent it out & demanded payment, but did not give up the note. Agent said the man would pay it, when he come from the Bank where he had gone for money.

2^{da} 910. 1248

1175 -

Boomer L. M. 482

Bills of Exchange

he called again, & was refused - & reasonable.

This rule then, may be drawn from the cases, as it respects the reasonable time allowed; that where the parties live in the same place, the bill should be presented within 24 hours - But there are cases in which the Drawer is liable without notice: & these are, where he has no effects in the drawee's hands - ^{the} ~~the~~ Endorser must always have notice because he has his action against

1 Burr. 410
405
714

* 3 Burr. 239, 1 do 652,
2 do 713.

** 150 R. 167, 712, 716, & 598.
a meeting that of the Court is -

the Drawer - ^{But Drawer need not be a notice when he}
has no effects in Drawee's hands - ^{But Endorser must always have notice as}
It has been said, there is a case in which notice must be given, even if the Drawer

has no effects in the Drawee's hands, & that is,
1 Burr. 20. 652,
3 do. 239. -

If bill is not protested on the last of three days of grace for non-payment, there after the bill is drawn fails, Drawer will be chargeable - except the day be a day or good holiday - when it should be the day of grace

in which he may receive some special damage. A draws a bill in favour of B, upon C, on the account of D. D. died & A owed D. B never gave notice of non acceptance to A - yet recovered it against him. A motion was made for a new trial, on the ground that A had credited D the amount of the bill, supposing it paid, which he would never have done, had notice been given. It was granted.

(1 Burr. 713 -

Bills of Exchange

What notice is necessary?

§ Brer 2670. One of the Island Bill endorsed neglects giving notice & endorses for a month of demand & refusal to accept to an amount of which he was paid, & in consequence could not recover of said endorser etc. It says there was no diff. in the case between inland & foreign Bills.

With respect to inland Bills of Exchange the mercantile Law knows no particular form of notice, only that he looks to him for payment. Foreign bills must go thro certain formalities which must be strictly complied with. An inland Bill of Exchange is any bill, the parties to which live in the Kingdom. In the U. States a bill drawn in one State upon a person in another is treated as a Foreign Bill. The mode is the following - When the Bill is

* 4 T.R. 175. In 2 Esp. N.B. 511 Plazman said that when notice of non acceptance was given & the endorser of foreign Bill not necessary that such notice should be accompanied with copy of protest for non acceptance - see vide & contra. Gills. Bar. 79 & Bul. N.B. 271. vide similar Selw. 4 B. 292. note & Bt. 442.

If there be no protest interest is not recoverable of the Drawer. See Bt. 910. But the party may still recover the amt of the Bill. Cases Champ. Hardw. 74. But not Lt. Ex. R. 993.

presented for acceptance & refused, it must be carried by the Holder to a Notary public^x He takes it & goes to the drawer & in a very solemn manner demands acceptance. If refused, he sits down immediately & makes a minute upon the Bill, the time, day & year when presented. afterwards he draws up a protest that he at such a time presented it for acceptance & was refused. He then writes to the Drawer, that the Holder expects to recover

Bills of Exchange

of him all the damages which he or any other person ~~has~~ may sustain from the non acceptance. This is then subscribed by the Notary & sent off the next post, & to his protest implicit credit is given. When the bill becomes due, it must be presented for payment, & if refused, the same

Bull. N.D. 271

Beaver L. M. 460.

To make Indorse. Bills notice to Ceremony is gone thus as before mentioned -
 & Drawer is answerable for every indorse
 nature of a new drawer. At 441. Kin. Mo. if it is accepted different from the tenor.
 At 281. distinction to the same effect to
 Bours. 674. 38 Oct. 482.
 when case of a promissory note indorse
 who brings on acts of indorsement must make
 and on each case diligence to obtain payment
 the maker of the note. 2 Bours. 676-7. 28 Oct. 1087.
 is where indorsement part. 1246.

In cases where Bills payable after
 sight or protest is not necessary & T.R. 170.

the same must be done; for you must demand
payment for the whole, tho it is accepted to pay
but part. If a bill has been accepted, &

it is notorious that the acceptor is in
 failing circumstances, the holder by a
 Notary public, must demand better security
 & if refused, must give notice to the drawer
 in order to make him liable. By the
 Common Law, the interest & actual damage
 is the rule of damages for non payment of
 money - But by the Mercantile Law you
 not only recover interest but damages, & the
 rule for damages is according to the particular
 usage in each place. In the United States,

Bills of Exchange

While we were Colonies, to the Southward of New York, it was 20th Ct. eastward ditto, by one decision it was 10th Ct. Judge R. thinks it so now.

The interest is calculated down to the time of the judgement - formerly judgement was only for the principal, as the instruments were for bonds. At Common Law, the same notice is not required in case of inland as of a foreign bill of Exchange. There was formerly no damages recovered on inland bills, but by Statute in England, giving notice as on foreign bills, subjects the drawer to damages as on foreign bills.

2 Burr 1086 -
to m^d. - 80 -
Jalk. - 131 -
Laird 992 -

Lecture 15th

Acceptance for the Honour of another.

It is a settled principle of the Common Law that you cannot make another your debtor without there is a privity of contract, or a moral duty compelling you to do the thing, or you are bound by Law to do it, if the other does not. But by the Law Merchant a man shall recover for a mere voluntary Countess. If A draws a bill upon B & C he will not accept it, but D accepts it for the Honour of A if D takes the necessary steps

Reaverell 486

Bills of Exchange

Beaver L M 454
458

presently, Law, it shall bind a the Drawer -
a third person may accept it for the Honour
of the ~~Endorser~~ & notice being given it will
bind him, the drawer, & all previous endorser.

If I accept it for the Honour &c. He is bound
to pay the Holder, at him he whom he may -
If for the Honour of the endorser, then for all
the subsequent endorser, if for the Honour
of the drawer, then for all indorsees. The
drawee may accept after having once refused.
& if it has been before accepted by D for the Honour
of the Drawer it does not discharge D, but adds
strength to the security. When thus accepted
for the Honour of D, the acceptor must
give notice by a protest if he has received
no approbation, or any disapprobation
but not otherwise.

The man who accepts the
Bill for the Honour of the Drawer, has his
remedy only against the Drawer but he
who accepts for the Honour of the indorser
has his remedy both against the drawer & all
previous subsequent indorsers.

Bills of Exchange

The holder is not bound to get a third person to accept the bill, he may if he pleases.

Notes are in the same predicament as bills

Wells. 144-5

acceptor is considered as principal debtor & primarily liable to all the parties & can be discharged only by express agreement of all the parties as drawer, indorser & acceptor at the same time, all the proceedings will be tried against drawer & indorser, upon payment of the amt of the bill & costs of the action, particular action will not stay proceedings of an acceptance is prima facie evidence of acceptance except on payment of costs in all the actions because he is the original defaulter & the occasion of all the trouble. 4 T.R. 691. p. 44-5.
Str. 575.

Contract between the acceptor & the drawer personally

An acceptance is prima facie evidence that the drawer has effects in the hands of the drawee but this presumption, like all others is liable to be removed out of the way. Suppose then he has effects - His contract is to pay the bill, & all damages on failure of payment - Consequently the Drawer has his action against the acceptor of the bill - But if the Drawee had no effects of the drawers in his hands, this will be a good defence on his part in the action against him by the Drawer. But the Drawer may recover if he has paid it.

Wells. 185 -

This acceptance once made can never be revoked - It is a principle of the common law, that when a right of action has once accrued, it cannot be destroyed by any words or without consideration. But by the Law merchant an acceptor may be discharged by the holder,

Bills of Exchange - 137

Reamer L.M. 454 mere words. And acts have sometimes been considered as tantamount to this -

No indulgence shown, or attempt to get it out of the drawer, with excuse the acceptor -
Then must something appear, which will show that the holder has given up all idea of looking to the acceptor for payment. No length of time, short of the Statute of Limitations excuses the acceptor. The old idea was, that receiving part of another would be a discharge of the indorser; but it is otherwise now -

There are a great many usages in the Law merchant. There is an usage in Turkey that an acceptor of a bill when he finds the drawer in failing circumstances, may apply to a Court within a certain length of time, to get the acceptances vacated. There is no such usage in any other part of the world.

A discharge from one indorser does not take away the liability of a preceding indorser. It was formerly an idea that the holder could not sue the indorser without applying to the acceptor; but it is now done every where, as no inconvenience in the Trade where all the parties lived together, but when they lived in other countries there was.

Doug. 237 -
247

Doug. 238 -
248

Sha. 733
2 do. 745

La.R. 744

Bullch. 271

Wils. 467

L.P. 669

Talk. 131.

Str. 441.

La.R. 443

Bills of Exchange

Waiver of Protes

Altho holder has paid & is not
 liable by law as in giving note
 got a subrogation & promise & holder
 by drawing. But will see the bill
 paid will enable him to sue on the
 bill. 8 Bank R. 15th ed. 202.
 17 R. 712. 2 H. Bl. 336.

& then it was done away — in 1810
 If you receive part of the acceptance or endorsement
 I do not protest, the drawer is discharged — not
 on the ground of part payment but neglect to protest.
 Complete satisfaction prevents further recovery
 on the instrument. As when there was an
 execution against A & B — A pays the whole to
 the officer & the execution is endorsed — A cannot
 have recovery of B's half for the execution is dead.

The Remedy —

This remedy is by action unknown to the Common
 Law & supplied entirely by the Law Merchant —
 or in other words, between the drawer & drawee
 the remedy stands as at Common Law — Action
 by indebitatus assumpsit, money lent & received,
 laid out & expended — But where there is no
 priority of contract the Mercantile Law steps
 in, & furnishes a remedy, without priority —

both 52 —

The ancient practice was, to set out the Custom
 at large, according to the case — then brought the
 case within the custom. All the Law was set out
 under the idea of its being custom but it is now

In order to derive a legal title to a Bill of Exchange payable to order, it is necessary
2 R. 654. for the indorser in an act of the acceptor to prove the hand writing of the payee or first indorser.

2 R. 28. Hence tho the bill may come into the hands of another person of the same name of the payee, yet his endorsement will not convey a title, altho the payee be not particularly described in the bill: such an indorsement if made with the knowledge that he is not the person to whom the bill was made payable will be forgery, tho the medium of which a title could be derived.

If the holder enters into composition with the acceptor he thereby discharges the indorser. Co. B. L. 18 se 3 Bro. Ch. C. 1 P. C. & other

Acts of the holder which discharge the bill.

2 Bro. Ch. P. 111
in Eldon Ch. P. If indorser receive part payment from the acceptor & take from him a security for the remainder, with the exception of a nominal sum, the indorser is discharged. But Receipt of part from acceptor will not

2 Bro. Ch. P. 271. - discharge the Drawer, if timely notice be given that the bill is not duly paid -

1 H. Bl. 88. - The receipt of part from the Drawer discharges the acceptor only pro tanto.

2 Wils. 262.
1 Bro. Ch. P. 652. { Notwithstanding the receipt of part from the indorser, the holder may recover the whole amount of the bill from the Drawer.

1 Bro. Ch. P. 653. It were forbearance to sue the acceptor after protest for non payment & notice, or what is equivalent to notice thereof to the Drawer will not discharge the Drawer: tho it is a rule that if a bill is given time to 3 Bro. Ch. P. 306. the principal debtor, with any reserve of the remedy of the creditor & the billon 2 Wils. 540. in 6 R. 807 the collateral sureties are discharged in Law & Equity, because the 2 Bro. Ch. P. 652. cannot call on the other parties without an inquiry to the person to whom the Law gives time.

The doctrine however in 2 Bro. Ch. P. 61 (above) must be confined to those cases in which the agreement between the holder & acceptor is made with the consent of the other parties to the bill, seeing they will not be discharged -

3 Bro. Ch. P. 363. as appears in 3 Bro. Ch. P. 363, in which it was adjudged that the drawer of a bill who had assented to holder taking a security from acceptor, was notwithstanding such security, liable to an act at the suit of the holder -

2 M. P. 1935 The holder may sue a prior indorser altho he has taken in exchange a subsequent indorser & afterwards let him go at large on a letter of license with having paid the debt.

Holder sued acceptor & charged him in exchm, the latter obtained his discharge under the Lord's act. Holder then sued drawer & recovered amt of the bill;

4 L. R. 825. cited in which case drawer sued acceptor & charged him in exchm; this was held to be regular, notwithstanding the Lord's act was a satisfaction of the debt as to the holder, yet it would not operate as such between drawer & acceptor.

2 Bro. Ch. P. 61. -

Protest for non payment must be made on the last day of grace
L.J.R. 174.

If Drawee has effects in the hands of Drawee at the time of the bill drawn, tho it does not appear to what amount, & tho such effects are withdrawn before the bill can be presented, the circumstance of their not being effects in the hands of the drawee at the time when the bill is presented for acceptance & refused, will not supersede the necessity of notice. 7. East 359.

* 5 Bosc & P. 589. Case of stating drawee name to be Bouch instead of Brouet, held fatal -
Sufft however to state the instrument according to its legal effect & operation.
1 H. Bl. 313 589.

7 Bosc. 546. Allegation that Drawee made the bill in support to supply the want of that of
delivery to payee in an actt by payee aft acceptance, or a bill payable to Off or order

Bills of Exchange

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1 Show 317.

Considered as Law & not Custom. The practice therefore now is not to set out the Custom Every thing must be stated which will entitle him to recovery

Lecture 16th

Declaration

Jalk 128-

The declaration on a Bill of Exchange is less particular than common Law declarations. Here certain words imply certain other words but it is still necessary to state every thing which will show the Plaintiff's right to recover. It must be stated that the Decreee made his Bill, in favour of such a person, directed

2 Ld R 1042

to a third requesting him to pay it. If it is a note, it must be stated that the maker made his note & promised to pay it & not that an assignment was raised. The day when

2 Show 423.

Carth 409-

drawn & the time when payable must be stated. At common Law the mode of making is stated. Then you have to state Law made & how the obligation was raised - i.e. all the facts on which the consideration is raised & then he, so becoming liable, assumed upon himself & promised. When the drawers name is signed by an agent it is not necessary to set forth in the declaration that it was signed by the agent.

Bills of Exchange

"nam qui parit pro alium parit pro se."

But when it is signed in the name of the agent you then set forth that it was done by the direction & authority of his employer. It is usual to draw three or four sets of Bills. For fear some of them should miscarry - therefore say in all subsequent bills - pay this my first bill second, third being unpaid &c. For when one is paid, the others are null & void - but the ^{word} payment of one need not be stated in the declaration as a bar to the others - nor that it need not be stated in the declaration that neither of them have been paid, yet if proof is obtained of the payment of one, it is a good defence to the action on the Bill but in suit. When an action is brought by payee against drawer, it must be stated that there was a delivery of the Bill to the payee, else he has no right to the money; that at such a time the payee presented for acceptance & then state whether accepted or not, that at the time of payment he presented, that he did not pay, in consequence whereof &c, & also that you protested notice regularly. In sum; you must state the facts of

Ld R^c 8/10 +

The 221 +

Decr. 1879 }
Question in appeal -

Bills of Exchange

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The execution of the instrument, that you did what it was your duty to do, & reasonably & did not get your pay - If the action is against the acceptor, that it was accepted, & consequently that he assumed upon himself & faithfully promised to pay it - If against the drawer, you must state that it was presented & refused & that it was protested & notice given him thereof that it was afterwards presented for payment & ~~refused~~ ^{refused} & again protested & notice given. The manner of notice & the acceptance to pay according to the tenor must be stated.

In an action by indorser against the drawer, of a bill payable to order, the circumstances of the parties will determine what should be stated. It must however be stated that he indorsed the Bill to the Plaintiff & this word indorses implies by the Law merchant, power given & delivery. If the endorsee parted with it, without endorsement, & the Holder may bring an action, & state the same as I would, & further, that he indorsed it, because this is always the presumption, & the proof that he obtained it by fraud lies on the Defendant. When the Bill is payable to Bearer you need not state

2d Br 817 -

2d Br 1542 -

Salk - 124 -

129 -

Carth 459 -

Bills of Exchange

any endorsement in your declaration, even if it has been endorsed, because the authority is not derived from the endorsement. If a bill is endorsed in full, you must go thro' the whole in order to preserve the chain. You must always state, notice given of what has taken place, between the holder & the drawer. If no notice is inserted in the declaration, & a verdict is found in favour of the Plaintiff, the verdict does not cure it - because it is an universal rule that a verdict does not cure the omission of stating that which is absolutely necessary, that which is the sine qua non of a recovery. But if stated badly, such as would be considered so, on a special demurrer, yet the verdict cures it - because it is stated, & the Jury have found a verdict upon the promise as stated, altho' not attended by the formalities required by Law. This may be illustrated by the Bridge Statute, notice wants to be given in writing - the declaration stated that notice was given, but did not state that it gives in writing - verdict cured it. The presumption of Law is that

Bills of Exchange

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The Jury found the fact as the Statute requires.
So they gave double damages accordingly -

2 Thom. 180 -

1 Wils. 185 -

In an action brought by the Holder of a Bill
against the indorser, it is not necessary to set out
a demand made on the drawer first as has been supposed.

The action against the Drawer by the
Drawer when he has no effects of the former in his

Quint 269 -

hands is not an action on the Bill, but at Common
Law, for money paid at his request.

Laird 538 -

Salk. 128 -

Cart. 409.

When all these facts are stated, you need not raise
the promise, tho always done at Common Law, &
even here it is necessary - By non assumpsit it may be stated.

In an action brought by A the drawer of
a bill, in favour of B the payee, so many
days after sight upon C the Drawer, against
C, he must state that he drew a bill upon C
in favour of B; that he delivered it to B, who
presented it to C for payment & was refused, that
he had the bill regularly protested; that he had it
to pay, by which means he became liable, in
consequence of his liability assumed upon himself
to the plaintiff & that he promised to (the
assumption as before observed may or may not be stated)

Bills of Exchange

C must prove that he had no effects in his hands of A's - because A need not state it - the presumption of Law is in his favour; & you need never state what the Law presumes for you & B brings his action against C every thing must be stated, as before mentioned except notice

A transfer without endorsement, by Law Merchant, never creates a liability except between the transferor & transferee - When you sell goods & take a Bill of Exchange ^{or note} in payment this does not destroy the right of action by the Common Law Contract - unless it was paid, or there is special contract to that effect. If the Bill is paid, the Defendant may plead it to the action on the Contract - or if not paid then the plaintiff's negligence, as if the Drawer was not called on at time of payment, & — months after failed - or on refusal to pay, no protest - If an action be by D endorsee, against B endorser, every thing as before must be stated, & that B endorsed

2 Wils. 253

is over to him. The holder of a Bill may sue all concerned in it at once & have judgement ag

§ 136. ~~except~~ all - but he can have but one satisfaction

Bills of Exchange

then the action is brought as the
Direct parties to the bill are both
indisputably counts as well as indubious
consideration since the bill
will merge the original demand
R. 241. 1 Bar. 12 58 2. 186 1

241.

When it is paid by one, it discharges all the others -
each one pays his costs, & some the principal,
interest & damages - or execution issuing against
each separately for their costs, & against one for
interest, principal & damages & his costs. If two exe-
cutions are obtained for the debt & levies, the Court
will lay the Plaintiff neck & heels for the Contempt!

The proper plea to this action is non assumpsit
& every thing may be given in evidence unless it
is barred by the Statute of Limitations, the plea is
non assumpsit infra sex annos - a promise to pay it
takes it out of the Statute. The ground on which this in-
ability goes is that the Statute has taken away the right
of recovery, & rests on presumption that the debt is paid.
Crawley will direct that all the debts, including those barred
by the Statute be paid. The Statute is a Law of police to compel
settlements & keep quiet; therefore a man promising to pay
after the Statute has run, waives the Statute; this he can
always do, & where a man is desirous of obtaining an act of
Bankruptcy in his favour. Does his creditor has large amount
but barred by Statute of Limitations. A creditor to include this debt to
make up the £300. now could he waive the Statute to the prejudice of
the other Creditors? Yes. When there has been a promise of waiver, that
act or Bond, it has been a question in which you must bring your
action on the promise or Bond. It has finally been settled in Stout v. Lee
in Circuit Court of U.S. that the action should be brought on the Bond

2 M & 749-

2 Ves - 115

Str - 515-

Bills of Exchange

Bene Wm 89

407

Atk 107

If all persons concerned in a bill should happen to be bankrupts, the holder may prove it under the commission & take his dividend: he may then prove the residue against another & take his dividend, & so on until he is paid -

Lecture 17th

Proof

La R 444

St. 946-
17 R. 555.-

3 Bm 1354

1 Bl R 390

Dumf 654

St. 110 as acceptor, need not prove
hand writing of Drawer - for all the accepted
acceptor can have it urged. 4 Bl. 1108.
2 Bl. 122, 655. 3 Bm 1354. 1 M. R. 390.
but first indorse, must be proved 1 Bl. 154.

1 M. Bl. 113-

P. R. 174

3 Wils. 18-

In an action brought by the holder against the acceptor, his hand must be proved. But the drawer's hand need not be proved, because the acceptor is supposed to know the hand writing of his correspondent. However when this reason ceases, the hand of the drawer must be proved. As where the acceptancer was without seeing the bill, as by promise in a letter or otherwise. If the action is brought by an indorsee, it must be proved that B indorsed it, & therefore the hand writing of both endorser & acceptor. If C brings it, if the bill was filled up by B to D, he must prove D's hand. If the acceptancer was conditional, he must prove that the condition has taken place. If against indorser by indorsee, need not prove drawer's hand nor acceptor's. If by drawer against drawer - the hand of the acceptor must be proved - It is every acceptancer that is prima facie, evidence of effects of Drawer's

Bills of Exchange

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In act of Drawer, ~~not~~ in Drawer's hands. As when the acceptor accepts
it is proved. T.R. 239.

For the Honour of the Drawer The manner of acceptance
proves whether he had or had not. A Bill is said

Gill v. Co. 117. 118.

to be protested, & the protest of the Notary is sufficient
evidence of the fact without proving his hand.

In act of drawer by indorser
acceptor is competent to prove
to drawer and no effects in
his hands. 1 Rep. N.D. 2. 332
do. 515.

And the security is strong, for the counterfeiting of in
many European countries causes death: we therefore
take this as evidence from the necessity of the case, as
we must stop somewhere.

In act by indorser of acceptor
He may call payee & indorser to
show that the bill was not absolute
Dain & Lambrooke 7 T.R. 601 -
in act of acceptor by indorser
when being released by acceptor
is competent to prove that bill was
in for serious consideration
the N.D. 224. 1 Rep. N.D. 515. 332.

In England the bill must be produced (this I
do not understand; for one bill was sent to one drawer
with one protest, & one action is against the drawer.
It is dishonourable to keep it back in this way the
difficulty is prevented. Where a protest is for non-
acceptance, notice only is sent but when for non-
payment, the bill is also sent.

In an action by B against A, the acknowledgment
of A that he drew the bill is sufficient evidence of the
fact. Confession is proof against the confessor, but
not against any other one. In the case of joint
partners, confession of one, is confession of both.

If a bill is endorsed by one as agent, you must
make out that he had authority. It is not necessary
to show a power of attorney - but that he was in the
indorser's business, & that the validity of his acts
had not been denied by the indorser.

Bills of Exchange

Whitman vs. Whiting
Dang-
Cill D.C. 117

In an action by Indorsee against the Drawer
He cannot prove that the drawer drew the bill
but can prove that indorsee said he did. This
would not be allowed. The bill must be protested
& notice given. Now what is evidence of this notice?
none. Whiting a letter & putting it into the office reasonably
sufficient to go by default on these bills, &

3 SR 301

2 Sr. 1149

damage is assessed by the board on a jury of enquiry

The default admits every thing but the
Quantum of Damages -

Interest - recoverable for bills payable at sight
is not carrying into the face of them, from the day
which they became due to time of payment.
signed. 23 Me. 206. 2 Burr. 1085. 2 RR. 58.

to take on note; seen for money owing for
goods sold & delivered. 3 Me. 206. Bull. 27. R. 58.

to for money
sent Bank. 119.

to for money
paid out & interest 114 Me. 138.

for work & labour 2 RR. 418. Sr. 1551

1 H. 11. 303.

Interest is due Low vs. Warner

on all liquidated Dang.

sums from the 3 Me. 206. 1 -

principal become due & payable

2 RR. 50. 1. - on the case but

was computed down to time of the

acquisition - but in 3 Me. 205 the

same case, it is said to have been

computed down to time of bringing

the action on only -

The want of consideration may be proved
between the immediate parties. If a third person
knowing there was no consideration brings his
action, if there was no fraud in the transaction
his knowledge does not bar his right of action

It is a part of the implied engagement of the drawer
that the drawee is at the place where he says he is.
If then the payee goes & finds he is elsewhere, he
must get the bill protested for non-acceptance
if he has removed to a place where it cannot be

Bills of Exchange

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presented within the time allowed, he must have it protested - The form of the protest is, to state the facts - as, not found in his place - But if he can present it within the time, he is obliged to do it & cannot protest without making presentment. If he is gone & has an agent who is known to transact his business in his absence, it must be presented to him. If he has no agent, it must be presented to his wife, for the presumption of Law is that she is his agent. If the drawee is dead, it must be presented to his personal Representative, the one whom the Law of the Land has made so -

Strange 1087

LaR 7.43

Lecture 18th

When a bill is paid up, it puts an end to its operation as a negotiable instrument - If the Drawer pays the bill on default of the Drawee, & wishing to get the money out of the Drawee, after payment indorses it to D who brings his action against the acceptor, he cannot recover, because the negotiability of the bill is utterly destroyed by the payment of it -

Bull. N.B. 241-

4 F.R. - 470-

Booker's Balan 168-

3 Mod 87-

If the holder of a bill proves it under a commission, & gets a dividend without notice to, or

Bills of Exchange

consent of the other obligors, he cannot resort to them; for they are discharged

2 Wils. 262

In an action of the indorsee against the drawer, altho the indorser paid part, yet he shall recover the whole sum against the drawer.

10 mod 38
an way -

Round 33 the other

Strange 222

Can you sue the acceptor without presenting it to him for payment? By the common Law, the debtor is to find out his creditor & make him a tender of the debt. But to this there are exceptions, & this is one. The holder of a Bill ought to go to the acceptor & make a demand of payment. for it would be highly injurious to the acceptor to look up the indorser, who may live at a distance or have transferred the bill. The universal practice & usage of business should leave this

2 Wils. 336,

Case N. P. 302

C gave a note to B who endorsed it as D - knowing at the time of endorsement that C was insolvent. D brings his action against B, but gave him no notice of the non payment by C - & the Court adjudged that in this case the notice was not necessary for it could not possibly do B any good being insolvent & B knowing it, at the time of the transfer,

Bills of Exchange

Et cessante ratione cessat etiam ipsa Lex

Where a note is given payable at several instalments, & you sue for the non payment of one, it has been considered that you can recover for the whole amount of the note, even when there is no agreement of that kind, & no penalty annexed for the non payment of the first. But later decisions have not recognised this principle but the opposite one.

When does the interest on a Bill Commence? on the day the holder gets it protested.

Can any one who has given currency to a bill or any other instrument, be admitted as a witness to impeach the bill or instrument?

He cannot, by the decision of Lord Mansfield & the whole Court. Where the action is by holder against the Drawer, who wishes to prove that it was erroneous & could not prove it unless by B who has endorsed it to D - in this case the Court could not allow B to testify - It has been adopted so in Connecticut - But it is now given up as untenable -

120 Jac. 505 -

11 Mod. 551 -

10 Mod. 28 -

1 RR 300 -

with title "Evidence"

2 H. 728. 1 RR

Rep vs Rhoades -

3 RR 36. 7 do 601. La R

444. 7 RR 604 3 do 174

182. RR 813. 569. -

4 Burr 225. RR 365

Peak RR 6. 52 -

Bills of Exchange

2d R 444.
7th R 604

An acceptor after acceptance cannot prove the forgery of a Bill.

3d R 759-

It is a principle of Law as well as of Equity that when there is such a concealment of circumstances as would have altered the bargain, that the person guilty of the concealment shall be answerable for it "Suppressio veri" is, as well at Common Law as at Equity, as much a Fraud as "Suggestio falsi"

3d R 174.182
481. R 315. - 49

A draws in Favour of a petitioner's payee, upon C - such a bill is considered as payable to Bearer, & can be so used.

It has been disputed whether a Bill can be drawn by an infant for necessaries, & he be bound by it - He is evidently bound by his contract for as much as the necessaries are worth. No infant is ever bound by an express contract; because if it were so, he would be bound by the terms of it. The reason why an infant is not bound by a bond, is because the condition is inexaminable. So it is with a bill of Exchange - which is binding between the infant & payee for the value of the necessaries, but not binding between the infant & indorser, because then the consideration is inexaminable.

Carth 66.
Lov. 86.
2d R. 40

Promissory Notes

There were not negotiable until that 31st Jan. as appears from
Lalk. 129. 8 mod. 20 & other cases. They are now on the same foundation
with bills of exchange & letters. This that has been constant & generally
since a note is promising to account with L.P. & Co. has been
held a promise to pay. See 8 mod. 362. 1 yr. 629. Ld R 1336-7.

See Lalk. 129. 8 mod. 20. 1288. after date, was held a good note & declared on as such. Ld R 123.

It is a mere promise when given to be paid to a third party & not to be paid to the maker.

So where it was that "I do acknowledge that he Ld. R. has delivered
to me all the bonds & notes for which £400 was laid down on
account of Col. P. & that he Ld. R. delivered me Maj. P. receipt & bill
on me for £10 which £10 & £15.5. balance due to him I am still
winded & so promise to pay." This was held a good note.

But there must be an absolute promise to pay & not a promise
depending on a contingency. Hence these notes have been
held not to be negotiable - & promise to pay & on the death of Maria
1223 - So many days after marriage of maker R. 1181. 1 mod. 417.
So promise to pay when maker should sell such an article. Ld R. 482.
Same principle in 2 Bos & P. 413.

It must be for payment of money only. Str. 1271.
"not in good East India bonds" Bul. N. S. 272. & on alternative
case cited in Ld R 1362 & 1396. The particular consideration
being expressed in the note does not affect it Ld R 1545.
cited in 6 T. R. 124.

Str. 24. 1111. 389. But where it was payable a certain time after a certain
ship was paid off, it was held negotiable. See Campbell's
argument in 1 Wils. 263 as to this case. Ld R. N. S. 972 note.

See further 7 Ld R. 733.

See Lalk. N. S. 130. - "promise to pay" signed by two or more persons, held moral as well as joint. Ld R. 832.
In action on a joint note where some of the makers are not joint advantage
can be taken of the omission only by plea in abatement & then in general 5 B. & C. 261.

Promissory Notes

Consideration

7 L.R. 121.

1155.

Comp. 755.
Solw. N.P. 995.

A gave B a note for £10 as a fee for his son's apprenticeship. B's signature was void not being stamped on, & the apprenticeship soon discovered from B, B then sued A on the note, & held that there was no good consideration.

A note, notwithstanding being for good & valuable consideration can be recovered on, for such illegal consideration only as makes the note void ab initio. viz. gaming & usury can be alleged in bar of the action.

But a person who has been induced by the holder of a note to put his name upon it, & in consequence thereof has been obliged to pay the contents to a bona fide holder, may recover the money paid from any person whose name is in the note, ~~albeit~~ he knew that the note was originally given for an illegal consideration.

Payment

10. 1. 23.

Payment must be demanded within a reasonable time after due. This is however a question of fact dependent on facts such as the situation of the parties, the price of their trade facility of communication &c.

A note payable a certain time after date or after sight the usual days of grace are allowed - the payment therefore ought not to be demanded until the end of the three days, unless this happens on a Sunday or great holiday, it should then be the next preceding day. These three days are computed exclusively of the day of the maturity of the note. It has not been solemnly decided whether days of grace are to be allowed on notes payable at sight. There are not about ~~three~~ on notes payable on demand.

See discussion in
Hutton v. Bell, 195.

10 L.R. 121. 1865. Vol. 10.

1. 1. 1875.
Merch. Solw. N.P. 999.

Note payable a month or months after date is computed calendar (i.e. by calendar & not by Lunation) in month. Comm. Law.
Indorse or demand & refusal of payment must give notice of this to the prior indorser in a reasonable time otherwise indorser is discharged.

Promissory Notes

Declaration, Pleadings Evidence &c

The usual country is in

an act, assault. The note should be specially checked on
2 accurately set forth for a material variance is fatal.

Sta. 725.
8 L.R. 648.

Also on a count for money Cert. or Rec. rec^d the note says
be given in evidence as a bribe & corruption. How so much money was
Cert. or Rec. rec^d & if not rebutted is suff^t - yet it is advisable to
declare specially on the note, for otherwise in case of judgment by default
the usual reference to compute both note in B.D. or further on in
B.D. cannot be made to compute principal interest & costs.

2 Ltr. 1087.
2 Brev. 6-6.

It being payable to A or order & endorsed in an act of A. Dancer
has no need to allege & prove a demand of the maker & notice of default
or refusal to pay within a reasonable time by the holder. He will

To this act any other may be pleased which may be to act no in contact.

2 Box 2 C. 120

Ans^d by A B & C of ^{to} D is one of the answers of a promissory note drawn by E in favour of B & C jointly then in partnership, & by them indorsed to A B & C on the same place in law, that C one of the Rpts. is liable as an answerer together with B - ~~to B & C~~ or ~~the elements~~ for such note on dissolution of partnership could not be put in suit nor enforced in equity because on a promissory note ~~drawn~~.

"We are going to issue a provision of our new currency national as within the declaration
of a great rule that to prove the contract the original note must be given in person or by
special agent it is not a note which can be moved to be lost or destroyed by theft." R^r 731.
as that it is in the hands of the Dept & he has had notice to produce it 22 Nov 20, 73.

24. Bl. 609.

2nd of Pages as to make Transacting of make must be proved by the
subscribing witnesses, & any or if more by some competent person to prove the
Transacting. The 2nd of just in case of make was good, & also part of the
reason "to R.R. in an act as 'Inover' proof of the contract of make
or any prior inquest to R.R. will be good and especially in the
declaration is not in sec 4, but in the case I must be proved that R.R. was duly
demanded of the make & refusal by him or refusal to notice thereof to R.R. is reasonable

at 28
in N.S. 1802

It is an act by a 2^d to be done, as a marker of just service in a blank as before noted
set, to my left the first envelope to be struck out the other, (in Sept. 18, 1861) the same the 1st
will be the same in the 1st (in Sept. 18, 1861) the same the 1st
be made.

after the removal of the resemblance between notes & letters begins.

for
now
1/2
Miss. in Feb

Powers of Chancery

Section 1st There has been much difficulty in defining or ascertaining by proper description the powers of Chancery because all the objects of this Ct's jurisdiction cannot be enclosed in any definition which has or perhaps can be given.

The proper jurisdiction of a Ct of Chancery has been usually divided in three particulars. 1st It is said it abates the rigour of the com. Law, 2^d that it decides according to the spirit & not according to the strict letter of the rule. 3^d that it has a peculiar jurisdiction over Fraud & deceit & Trust. This is Littleton & Cook's definition & the same is given by Sir Kames - Again it has been said that a Ct of Chancery differs from a Ct of Law in this that the former is not bound by precedents or positive rules.

This description is now agreed to be very imperfect. It is imperfect in all the parts of a good definition. For first, it is incorrect because it supposes a Ct of Chancery to possess powers which it does not & to do by because it does not give this Ct all the powers which it does possess.

1. It is said, it is in the power of a Ct of Chancery to abate the rigour of the com. Law. But this power has never been claimed except in the same way in which a Ct of Law would do it. True, Chancery gives relief where Law cannot, but it is on the ground of jurisdiction. There are many rules of the Com. Law which are extremely rigorous. Thus before the

Buttress 5.
2 Bl. 429.
Hall 94.
10 Mod. 1.

Powers of Chancery

Let Mr. May, if a Doctor conveyed his real estate his Con-
 cession never could have a remedy In this case neither Law
 nor Chancery could give relief; & even now a man's real estate
 given or devised or inherited is never liable for his simple
 contract debts - but Chancery cannot interpose - The rule of
 descent that a lineal ancestor shall never succeed to an
 estate is a positive & rigid rule of Law, yet Chancery cannot
 prevent this rule from operating, so that the half blood should
 be excluded is a rigorous rule - Equity cannot change expression
 the Law. These show that many rigorous rules of Law are
 now established - & yet the definition is that it is the duty of
 Ch. to do away these very rules of Law. In fact the rules of
 Com. Law are not hard & rigorous for various reasons however some
 are so - It is true then generally that a lot of Ch. Law nothing to do
 with availing the rigour of the Com. Law -

2 Pl. 288.

2 Pl. 283 &
211.

3 Pl. 130.

2 Pl. 232.

Law this says that a lot of Ch. decides according to the spirit
 of the letter of the rule - But a lot of Law is bound to decide
 according to the spirit of a Law - & it is a standing & cardinal
 rule in the construction of all Law that the spirit of it shall be
 the guide, & all other rules are made ancillary to this - The
 rules of construction are com. to both & to the construction of Contracts.

2 Pl. 431.

1 do. 51.

Doy. 284

Horn L. 101

97-8.

3 a lot of Ch. it is said Law a peculiar cognizance of matters of
 fraud accident & trust - But as to fraud there is perhaps no person
 of it which may not in some way or other be decided in a lot of Law
 a lot of Ch. has not exclusive jurisdiction of Fraud because matters
 of fraud are generally decided there - The reason why Ch. interposes

Powers of Chancery

Ann. Dec. 191.
10th Mar. 28th
3rd Dec. 17th
- 544

generally in fraudulent transactions is because the method of proceeding is better adapted to a discovery of the relief given is more consistent. Indeed in some cases the Ct of Law have an exclusive jurisdiction of matters of Land as the question whether a Deed was obtained from a person by fraud.

2. Accident - This time that Ct of Chy will often relieve from the unfortunate consequences of an accident than Ct of Law but yet the latter will do it as in the case of Boes lost which a person may avail himself of in a Ct of Law as much as in a Ct of Chy. Thus in a bond which a man has lost he may declare on it & say it was lost by fire or accident & a Ct of Law may give the amt of it if it was not lost by his own negligence, which is as much as a Ct of Chy could do - Perhaps Chy relieves in more cases of accident than Ct of Law but it is not true that it has an exclusive jurisdiction.

3. Mistakes - Chy relieves of more mistakes than Ct of Law - not because it has an exclusive jurisdiction, but for the reasons given before, in its mode of proceeding & the competency of its relief - But mistakes are relieved in Law as mistakes in acct^s contingencies which render the performance of conditions impossible - But all mistakes cannot be relieved of either in Law or Equity - as if a Deed is ill executed by mistake Chy can give no relief of it - So where a contingent remainder is destroyed at Law by some matter of accident Chy can give no relief of it -

5th Dec. 14.
3rd Dec. 15.

Powers of Chancery

Trusts - These are greatly cognizable in Ch^y & some of these
 these only - But a lot of Law has cognizance of Trusts in many
 cases - As in common cases of Bailment when the Bailor is a trust-
 trustee - There is no case in which a Ch^y has exclusive
 jurisdiction of a Bailment because it is a trust - In case of money
 L^y & even the receiver is in strictness of Law a Trustee, yet there
 is no need of applying to Ch^y for relief - A perfect technical
 trust is regulated in Ch^y only - for this reason that the title in
 Law is not consummate - It is only binding in conscience
 & Ch^y will in some cases aid a title defective at Law -

3 M^o. 471-2

M^o. 105-
 200. 307-

Mistake in written instruments are greatly aided only in
 Ch^y - The reason is not because there is any intrinsic in-
 equality in a mistake which renders it peculiarly cognizable
 in a lot of Ch^y but because in the case a L^y Court could
 not give complete relief on account of its mode of proceeding -
 Suppose a bond executed for two thousand dollars when the intent was
 only one thousand & afterwards the obligor is dishonest enough to hold
 fast & insist upon the \$2000 - Now in Law a court of law cannot
 be allopproated - The bond is either the act of the party or not -
 If it is the Law must give the amt of the bond - unless there
 have been payments - If non est factum might be pleaded till
 the obligee would suffer for in Law a right to \$2000 - a L^y
 then cannot appropiate the bond & the Ct never appropiate Law
 But the Chancellor can make a decree that the obligor shall pay \$1000
 & upon doing this the obligor shall deliver up the bond -

1 M^o. 200. 298

2 M^o. 200. 303.

3 M^o. 200.

1 M^o. 200.

1 M^o. Ch^y 341.

2 M^o. 200.

1 M^o. 200.

2 M^o. 415-76-99.

Kirby 399.

Days Case

Parsons vs Sanford.

Powers of Chancery

Estates - It is said that of 10/4 are not bound by precedents or positive rules. A more incorrect position could not be laid down. These 10/5 are bound by precedents & many of those which they wish to get rid of. Then a distinction is made between the right to Dower & Curtesy. If the husband is possessor of a free estate it is settled in 10/4 that the wife shall not be endowed of it, but if he dies possessed of a trust estate, he shall be tenant by the curtesy of it. If there is such a distinction made it ought to be in favour of the woman, for she may get rid of the wife, but she cannot for him. again, a third distinction is made in a mortgage between one at 5 & 10/6 with a clause of redemption to 4 of the interest be regularly paid, & one at 4 with a clause of enlargement to 5 if the payment of the interest be deferred - one being an unrighteous the other a conscientious bargain. There are positive rules founded on precedent.

Don. M. 12.
— 321
20th 640.
100th 604.

Mitford 4 -

There is not a particle of difference between them. The substance is precisely the same.

Thus far with regard to the general description given of the powers of Chancery.

Judge Colchester has given another which altho not complete is the best that has been given. He says the principal difference consists in the modes of administering justice requiring effect to the same principles. A third difference consists in three particulars - The mode of Proof of Trial & of Relief -

1. As to the mode of Proof - In this particular 10/4 has a great advantage over 10/5 of Law. It can compel a

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disclosure of the party under oath. This is a power the common Law has not - Why? The reason is not given in the books. But there is a substantial one; viz, that if a party were compellable in Law to make a disclosure he might be greatly injured by a positive rule of Law - In why this can never be done a Ct of Equity has no criminal jurisdiction whatever & sometimes in a Ct of Law the disclosure would work a penalty - And it has therefore become a standing rule in Equity that if the disclosure will work a penalty the Chancellor will enjoin the party & all others & compel them to enter on record not to sue for nor take advantage of the penalty - This compulsory disclosure is called pursuing on oath & is binding to a party's conscience; & the party may be compelled to make a disclosure of all facts within his knowledge -

2 M. 381-2.
— 437.
— 449.

From the power of compulsory discovery Chancery has obtained concurrent jurisdiction in matters of fact & administration & distribution of Estates - & testamentary affairs generally - in many cases of fraud - when Bailiffs & receivers are used - There are all incidents to the power of compulsory discovery - & the Judge in the same inequality as at Law -

2 M. 145.
3 M. 148.
2 M. 244.
3 M. 434.

As to the mode of Trial: Chancery trials are by interrogatories & taken in by counsel & approved by lot from which depositions are taken out of Ct & afterwards read in Ct. This is not the usual mode in Com. & is inferior

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This mode of trial is useful in many cases. In some cases the questions cannot come up before the C^t without the interference of Ch^y - as, if a witness is about to leave the realm, is aged or infirm, Ch^y may take the depositions provisionally, which are called de bene esse taken by a Commission granted to perpetuate testimony. These depositions thus taken may be used in a C^t of Law & Ch^y will enjoin the opposite party not to object to them. In consequence of this power Ch^y may exercise a jurisdiction over the subject itself which a C^t of Law might do, the witness might be called before them. This is incidental to a collateral jurisdiction of them.

Book 2^d

3. As to Reliefs, Chancery in many cases affords specific relief. So if executory agreements for the sale or purchase of Lands are made Ch^y will decree a specific performance of them - a C^t of Law could only give damages for the breach of the agreement which might be very inadequate -

2 Pl. 498.
3 Cr. 172 215
1 Ez. cas. 15
1 Doublt 413.
15 M^{ss} 592

Indeed in many cases Ch^y assumes jurisdiction for the very purpose of giving a more specific remedy than can be had at Law. It interferes & assumes concurrent jurisdiction - for notwithstanding damages & under the Stat. of Gloucester the thing wanted - but Ch^y will give an injunction to prevent it.

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Specific relief is meant that which vindicates the party in his rights as he was before they were actually violated. This injunction in the before-mentioned case merely continues him in the enjoyment of his rights as they were before violation. So it is properly called "specific". So when Chy interposes to prevent the effects of a fraud in a contract it affords a specific relief & vacates the contract either wholly or partially as justice may require. Whereas Ct of Law will compel a performance & afterwards give the party injured damages in an action on the case. So it requires two facts. But Chy prevents the evil, & preventive is better than punitive justice. In many cases Chy will decree for that very purpose.

2nd. 498.

1 Vern. 303

In some cases in Law to be sure the remedy is specific as in Ejectment, & sometimes in Detinue.

I have gone thus summarily thro' the three specific uses in which Chancery differs from Ct of Law viz^t - mode of proof - mode of trial & mode of relief - But they differ in other respects & as to those it is more difficult to ascertain the boundaries of Chancery or to describe its powers than in the other three particulars.

The diff^t view taken in a Ct of H^h & a Ct of Law of a personal Bond gives a great jurisdiction to the former. In a Ct of Law the whole penalty is & must be recovered

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In the breach of such a bond - that in Chy the penalty will not always be given for the Chancellor may look into the question & if he sees that the damages are not equal to the penalty he will chancery the bond & will decree what is really due. In Law the penalty is considered as a Debt: In Chy. it is considered merely as a security for the Debt a nomine penae. Here then it will be said a diff^t construction is put upon the whole instrument & there could have been none in a Co^t. Law. True, so be it ~~Law~~ but diff^t constructions upon a whole instrument, & a bond a penalty is not considered in Law as a Debt - as where a penal bond is given for the security of a Debt & not for the performance of a condition. The Ct. of this L^d has a long time will give not only the bond but the interest. Here they consider it as evidence of a Debt.

3rd 434.
434

It cannot then be said with any more justice that ~~Cts of Chy~~ & of Law differ in the construction of diff^t instruments where the penalty & the condition in the same 4th on this ground Cts of Chy^l have obtained a very great & almost exclusive jurisdiction of Mortgages. The condition here is in the nature of a penalty & is noticed by Chy in the same manner as penalties in penal bonds - at Law the interest of the mortgagor is gone forever unless he pays at the time specified - at Chy it is different

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This Ct has created an Equity of redemption unknown for most purposes at Law - Here it may be said, there is a difference of construction in the two Cts, altho it is a general rule that the construction of an instrument should be the same both in Chy & at Law - yet the mode of construction between these Cts may be diff as well as between two Cts of Law. But as I before observed this Equity of redemption is for some purposes considered in Law so far that where it exists they will consider it such a freehold interest as confer a right to require the person entitled to it the power of voting for members of parliament. The objection is no more proper here than it is where there is a diff rule of construction in the same Ct on the same instrument for diff purposes - This forms a local ground of distinction -

It is a technical trust or use Lands or in real estate as contradistinguished from a legal estate affords a strong illustration to the English Cts of Chy - not so much in Law - because trust estates are little known in Law.

A trust estate is one where the legal title is in one person & the beneficial title is in another - For ordinary purposes Cts of Law will not take notice of creating any trust estates - They notice only legal estates. Chy notices equitable estates. In a Ct of Law the legal title must govern - yet where an estate is given to one to hold for another's use & benefit

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then sought to be remedy provided for him who has the beneficial estate a Chancery has power to give this remedy.

Milford in his pleadings a Chancery has endeavored to give a gen^l description of those powers of Chancery which are not comprised in the three divisions. The description which he gives is this: He first says with Bl. that a Chancery assumes a jurisdiction by its diff^{nt} method of administering justice & then says 1st that Chancery has power to enforce justice where positive Law is silent & where with the intervention of Chancery justice could not be done - 2^d Chancery may abate the rigour & supply the defects of the com^l Law where such rigour & defect is a collateral & unforeseen consequence of the rule of com^l Law. 3^d He explains this 3^d com^l But to do these things by avoiding collateral mischievous consequence is nothing more than giving effect to the true spirit of the com^l Law. & 4th & 5th Chancery has a right to judge according to the spirit of Law. yet he says that if the unjust consequence of a rule of Law is direct & obvious & if the rule seems for the cases to a hith^{rt} it literally extends & must have been foreseen at the time of making the rule, Chancery cannot interfere & prevent the consequences of the rule -

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Examples of both kinds - A Injunction to prevent waste - Com. Law affords no preventive remedy - before a man for life then commits waste - now a b's adv can only give damages after the fact is committed - But if there is a plain intention on the part of the tenant to commit waste, Chy which is always open will issue an injunction to prevent him from committing waste -

Mitford. 4-5
103.

Again - It is a gen^t rule of Law, that all contracts made between husband & wife before marriage are avoided by the intermarriage: But it seems laid that those contracts which are made for the furtherance of the marriage should be avoided by the marriage - Now there is hardly a marriage in Eng. with a marriage settlement; & a Ct of Chy will enforce these marriage settlement agreements the com. Law rule to the contrary notwithstanding - a Ct of Law does not thus decide according to the spirit of the rule & all the decisions in Law are that such agreements cannot be enforced in Ct of Law -

These distinctions embrace all the well defined grounds of the jurisdiction of a Ct of Chy - the perhaps not all - one ground of the jurisdiction of a Ct of Chy which comes under the third particular mentioned by Mr. Vice Chancery,

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consists in ordering a specific performance in various circumstances. The power has been exercised from very ancient times, from the reign of Edw. IV. to the reign of Jac. I. There was a violent contention between the Co. of Law & the Co. of Ch. on this subject. The former held that Ch. had no power to decree a specific performance & that the parties had a remedy only in Law

1 Geo. 2. 351

1 Fort. 27-8.

2 Cow. 5-5.

2 Atch. 172

by a recovery in damages - but the Chancellor stood

his ground & obtained a complete victory. However

at this time they were not frequent. They became quite common in 2^d year of Geo. 2^d -

1 Fort. 18.

93-

Now thus by recording a performance specific that marriage settlement agreements made before marriage in Ch. are carried into effect. *Qu'rule at Law contra 1844 2 Geo. 2. 351.*

By a specific performance of executory agreements is meant, that the things agreed to be done should be specifically done i.e. that the very things should be done

There have been questions made whether such marriage settlement agreements should be superseded when they were in the form of a penal bond. But it is now settled that if either party execute a bond before marriage to settle an estate upon his wife either before or after marriage then bond shall be specifically performed as an agreement by the ^{verbal} Co. of Ch. It is not in the form of an executory agreement the Co. considers it as a binding one. The object was

1 Fort. 16. 93-4.

2 Fort. 243.

2 Atch. 77.

1 Nov. to 345.

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to procure a settlement on the wife & to constitute an agreement made between them as an execution agreement would defeat the object & Equally adverse to the substantial object

Such a bond is good or not at Law according to the difference - formerly holden that it was to be avoided If it is made with a condition that such & such things shall be done after coverture is ended it is good at com. Law. but if the

things are to done during coverture it is void at Law -

Because the wife cannot sue her husband at Law - In the

former case the heir of the husband will be compelled to do the thing his ancestor covenanted - If it were payable during

coverture it would be void at Law

Again - It is a clear rule of com. Law that an

agreement made between husband & wife during coverture

is void - And it was formerly holden that in Chy. such an

agreement could be enforced only thro the medium of trustees

Now such an agreement made during coverture may

be specifically enforced in Chy. with the intervention of

trustees. The husband is considered as trustee to the wife

He has the legal title for her use & he has the beneficial interest

The ground of Chy. interference in this case is its peculiar cognizance of technical trusts. The mode of enforcing the contract is founded in its power of enforcing specific contracts -

and it is to be observed that where Chy. has enforced such an agreement between husband & wife, the latter may sue on of the husband's leg.

40 Bt 216.

Lalk 925

5 H.R. 981.

Lalk 515.

Chanc. 442-3.

Lalk 335.

1 Inst. 3.

Litt. 183.

1 Thombl. 94-5.

Dec. 1624 22.

3 Inst. 72.

180. 270.

2 Mos. 308.

Pos. Com. 444

181. 19. 555.

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1841. 442
1 Inst. 112. most cases in which she was a feme sole. Thus she cannot make a contract respecting it which will bind her at Law - she may bind herself as feme sole according to the Law of Equity, not according to the com Law.

It has been decided in com. that such a contract made between husband & wife cannot be enforced.

Look 3 I observed yesterday that an agreement between husband & wife was sometimes enforced in Ch^y notwithstanding the com Law rule that contracts between husband & wife are void - & that the foundation of this was their right to enforce a trust.

It is to be observed in general however that Ch^y will not enforce such contracts where the effect of enforcing them is prejudicial to creditors. And if there is no concealment & any appearance of fraud it will not be good against bona fide purchasers even in Ch^y.

But want of consideration is no more conclusive evidence of fraud in this case than in any other - It is not sufficient evidence of fraud here - It will not therefore be set aside merely because it is voluntary - There must be some appearance of fraud -

1 Foulth. 95.
30. 11 Wms 349. 399. 1000. 1100. 1200. 1300. 1400. 1500. 1600. 1700. 1800. 1900. 2000. 2100. 2200. 2300. 2400. 2500. 2600. 2700. 2800. 2900. 3000. 3100. 3200. 3300. 3400. 3500. 3600. 3700. 3800. 3900. 4000. 4100. 4200. 4300. 4400. 4500. 4600. 4700. 4800. 4900. 5000. 5100. 5200. 5300. 5400. 5500. 5600. 5700. 5800. 5900. 6000. 6100. 6200. 6300. 6400. 6500. 6600. 6700. 6800. 6900. 7000. 7100. 7200. 7300. 7400. 7500. 7600. 7700. 7800. 7900. 8000. 8100. 8200. 8300. 8400. 8500. 8600. 8700. 8800. 8900. 9000. 9100. 9200. 9300. 9400. 9500. 9600. 9700. 9800. 9900. 10000. 10100. 10200. 10300. 10400. 10500. 10600. 10700. 10800. 10900. 11000. 11100. 11200. 11300. 11400. 11500. 11600. 11700. 11800. 11900. 12000. 12100. 12200. 12300. 12400. 12500. 12600. 12700. 12800. 12900. 13000. 13100. 13200. 13300. 13400. 13500. 13600. 13700. 13800. 13900. 14000. 14100. 14200. 14300. 14400. 14500. 14600. 14700. 14800. 14900. 15000. 15100. 15200. 15300. 15400. 15500. 15600. 15700. 15800. 15900. 16000. 16100. 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17th. 264-263

2d. 218

3d. 80

Yet if he is not greatly in Debt & makes a contract to settle a Sum on Family settle^t with any kind of Fraud tho' afterwards becomes greatly indebted, Ch^y will not set it aside in favour of his. The same rule applies to subsequent purchases as to creditors -

1 Hen. 132

484

476

17th. 264

That un^d. any or all these circumstances, the Contracte. voluntary, it is binding upon the Husband or his representatives - He nor they can make an objection that it was voluntary or that it was done ~~to~~ to fraud ~~con~~ tho' a voluntary conveyance is presumptive evidence of Fraud - but it may be rebutted -

It appears from several examples that Ch^y adheres to the substantial object of all contracts & gives effect to them so as to attain that object - & this it does with regard to the particular form of the contract - This is the case with a Bond given to convey Land. Here Ch^y will always compel obligor to convey the Land altho' there is no stipulation or express covenant to do it. unless the penalty is in the nature of assessed damages - & when enforced it is considered in ~~as~~ an executory agreement -

If one of two or more co-obligors pays the whole Debt & then as the easiest way takes an assignment of the Bond giving his act as the co-obligor in the name of the obligee Ch^y will order the co-obligor not to plead that the obligee is dead ~~therefore~~ ~~that~~ the Debt is discharged - and if this case was put but he was paid the whole was only surety, Ch^y will

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173.

order the other obligor to pay the whole & issue an injunction to prevent the co-obligor from pleading a payment in an action in a Ct of Law on the bond - In this case the Ct interposes to enforce the agreement between the obligors implied by Law from the facts as they exist.

Yes. 371-4
35 L.R. 423
2 Mac. 701.
Read. 184.
8 L.R. 156.

A Bill will therefore be retained on the part of the man who has paid the whole on the ground of an implied contract.

The law there would be no necessity for obligors to take in this case - for the obligor left with him for money - paid out & expended & given some value in the books it seems the action would lie in Equity.

How. Co.
375.

And if the person has paid the whole as fully the action will lie in the Law for money paid for his use - But where it is a single bond as in the case just mentioned there can be no act of discharge.

With regard to the equitable cases in which Chy will interfere the Chief rule is that equitable intervention extends to all cases where the subject of the contract or the parties to it are within the jurisdiction of the Ct for the Ct acts as well in personam as in rem.

As the rule stands in the books it is incorrect for it cannot mean that whenever the subject or the parties are within the local limits of its jurisdiction it will afford relief. It is it would have cognizance of all cases which a Ct of Law could have - But it certainly has no such cognizance - The rule means this that where the matter

Powers of Chancery

in dispute is of fact a matter as to require the interposition of Chy, that Chy will take cognizance of it if the parties to be bound, or the subject matter of the contract is such as is within the jurisdiction of that Chy. The rule in the books then should have been expressed in the 'negative' that Chy, does not interfere where the subject or parties are not within the jurisdiction of the Chy.

Thus suppose A covenants to convey land in Eng. to B & leaves the Kingdom. This is such a contract as requires the interposition of Chy. For they decree specific performance of contracts. This then is within the rule for altho the party is within the R. S. still the land the subject is within the jurisdiction. Facts here in re.

2 Wms. 494.

1 Ves. 204.

If A in Eng. agrees to convey land in R. S. to B: Chy will enforce this, because it acts in personam as well as in rem by process of sequestration of goods, & contempt.

1 Ves. 444. 454.

This Chy enforced a specific performance in the case of Gov. Penn & La Battenore in case of the boundaries between Pennsylvania & Maryland.

But where neither person nor subject are within the jurisdiction of Chy it cannot interfere whatever the nature of the case may be. Formerly it was held that this Chy could not act in rem, i.e. it could not specifically enforce its own decrees, but that it could only act in personam.

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This has long since been overruled & it is now settled
that Chancery can ^{act in rem} by ~~assessing~~ process to ~~put a party in~~
possession of Land (within its local limits) by injunction or
writ of assistance to the Sheriff as well as in person and
while the old opinion lasted that Chancery could not act upon

Month. 91. 91
Nov. 8-9.
32th. 275
— 387.
1st. 543
1st. 454.

the subject matter of the Contract it would have been necessary
for that Ct to have made a Decree respecting the sale of
Lands. The practice of acting in rem just began in Dec. 1.

I have contended the great grounds on which Chancery
interposes - but I have not the particular cases under
those great grounds, in which they will interfere -
Generally however they will decree a specific performance
of agreements properly falling within its jurisdiction
in those cases, & generally those only where the Law
will give damages, for the non performance of the
agreements. -

on the contrary, they will not generally decree
a specific performance where the Law will
not give damages, altho it may fall within its jurisdiction

Nov. 14-16. and they will not decree the specific performance
of course because Law will give damages, for its
non performance - It must fall properly within its
jurisdiction - Whence arises the reason of this distinction?
or is there any reason for it - I think there is an
obvious one - which may be furnished by a recurrence
to what has before been said -

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This action for specific performance is quite only an aid to the remedy furnished by Law or in other words this power is exerted principally for the purpose of giving a more complete & adequate remedy when the Law before gave an incomplete & inadequate remedy - The principles in the two acts are gentle the same, the thing have diff^r modes of proceeding -

In pursuance of this thing will not enforce a voluntary agreement except between husband & wife because for a breach of a voluntary agreement a lot of

16ow. 341
242.

100k. 10

11et 450. 74

11th 798 or 796

Law would give no damages - or even in case of Covert under seal - And they will not raise a right which the contract does not raise - & that a voluntary agreement is in Law a nudum pactum.

But there are exceptions on both sides of this rule - 1st a specific performance will not always be enforced in Chy altho the Law would give damages for a non-performance of the agreement. Thus suppose that after an executory agreement is entered into for the conveyance of Lands &c a Third person not knowing of this agreement should become a bona fide purchaser & get the legal title. Here Chy will not decree a specific performance because it would be unjust as to the purchaser - the Law paid a valuable consideration

as he was ignorant of the executory agreement - I was
him as bona fide purchaser with^t notice - And
if the other party, it is negatory to have become
impossible that it should be specifically performed
in the view of a bill of exchange - Yet in this case a bill
of exchange will give damages & the reason of this is the
want of relief from - a bill of exchange - The Equity is
equal on both sides, & it is a rule that where the
equity is equal, Law shall prevail -

Is't an agreement to convey or on a valuable & adequate consideration is this, will bind the subject as a^t intervening judgment creditors because they have not a specific lien upon it. (Even if the consideration of the agree^{mt} is very inadequate) It is a gent lien or encumbrance upon the Land, but the executory agreement is a specific lien & shall have the priority. This is diff^t from a direct conveyance to a third person.

It also when the Bill is to compel a Defor to accept a conveyance & pay the consideration money. Chy will not decree a specific performance where the title of the Bill is under embarrassments not immediately removable, the damages might be recovered at Law. It would be inequitable to decree a specific performance & yet according to the rigid rule of Law, the must pay damages for the non performance -

1. 11/2 426.
282. 279.

Wm 282

17 m. l. 148
2 p. 149
2 p. 150

Powers of Chancery

Law, 187.

If one person covenants to convey land to another which actually belongs to a third person Ch^y will not compel a specific performance of the contract yet damages in such case will be recovered in Law—

Leck 4th I yesterday observed that Chancery will decree a specific performance of agreements falling perfectly within its jurisdiction where damages would be given in Law— I mentioned some exceptions to this gen^l rule & that there were exceptions to the contrary branch of the rule viz that Ch^y would enforce a specific performance where no damages would be given in Law—

An instance occurs in the case of a Bond given before marriage to convey lands after coverture— Now in Law this bond is destroyed by the intermarriage of course no damages— But Ch^y will compel a performance of it. as where a feme sole made such an agreement to convey Lands to her intended husband— Damages could not be given for a breach of this agreement in Law, but Ch^y compelled a specific performance of it. The reason is a plain one— It is most obviously improper that a civil act should lie between husband & wife— a recovery in a Ct of Law is strictly jure & therefore even might go ag^t her personally But in Ch^y the decree binds her property only

Powers of Chancery 179-

2 Nov. 5. 10.

254-7.

20. Nov. 243.

We have no process in this Ct which will act against a person - The decree acts in rem & this is bound only to the extent of her property - For she is not liable under the decree as a stranger would be - the covenant is considered as binding only as the subject - & the extent of it only in a Ct of Chy -

1 Doubt. 58-9.

2nd. 58-9.

20. Nov. 244.

It also in the case supposed the intended wife who contracts to convey lands to her intended husband Chy will decree a specific performance of this agreement altho she were under the Inf. of her parent or guardian contrary to it & it was made on good consideration -

Another instance of this kind is where one lends money to an Inf. to purchase necessaries & he actually expends it in necessaries - Now in Law the money thus lent is not to be repaid by the Inf. because his privilege is not to be destroyed - But in Chy the Inf. would be subjected only to the amt of the value of the necessaries & therefore there is no danger that his privilege will be infringed - In Chy the lender is considered as the seller of the necessaries - complete justice then is done to the Inf. & yet he is subjected This is a case in which relief perhaps is not specific -

2 Nov. 258-9.

5 Mod. 368.

10 Nov 588.

1 Doubt. 68.

It also where the agreement is made under the act of a Ct of Chy itself, that Ct will enforce the contract

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tho a Ct of Law would give no damages for a breach of it - as in the case of a judicial sale of an estate in Ch^y. The purchaser indeed acts for himself, but the seller acts for the Ct. It is therefore a judicial proceeding. A Ct of Com. Law cannot interfere, because it never interferes in the judicial proceedings of Ch^y or any other independent jurisdiction. It is common for the Chancellor to order the master to sell the estates & incumbrances & as to give effect to his decrees - The sale is called a judicial sale -

Now. 14.

Further - Where the condition of a Bond is destroyed or the binding force of a contract extinguished at Law, by the obligor becoming Cr^t to the obligee, Ch^y will enforce the contract in favour of those who have higher claims than the obligor - It however could not be enforced at Law.

Thus A executes a bond to B who dies making it his Ex^t - at Law this obligation is extinguished, because it cannot be enforced - The reason is the same reason would be both Off & Defor^t - a man cannot sue himself - But no one can in this case sue A but himself -

10 mod. 515.

9 Co. 62 -

Ch^y will however order him to pay it to the Ex^r or legatee if necessary, for he is considered as then trustee - Ch^y having cognizance of Trusts decrees a performance -

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Mr Powell states the distinction where Ch^y will & where it will not decree a specific performance where a damage would not be decreed at Law to be this - If there is a good agreement in substance but one which is in defect at Law - by reason of a formal defect, Ch^y will decree a specific performance - ex. gr. case of Wells. Gen^l a sole, not an absolute

But where it is ineffectual at Law by the non-happening of events as provided for by the agreement, Ch^y can give no relief - ex. gr. Husband covenants to settle on the death of his mother & in coming into possession she never comes into possession, agreement not decreed. Perhaps the distinction is proper. The former last hardly conveys the idea contained in. By formal defect are not meant mere mistakes in the recital. It often means an inherent defect in the thing - all the cases before-mentioned are recited as formal defects. This is not using language as we should use it -

I have observed that a lot of Ch^y will gently decree a specific performance where the subject falls within its jurisdiction - yet it is to be observed that if the damages given at Law would be an adequate remedy they will not gently decree - It then falls not within the jurisdiction of the Ct. If an adequate remedy can be obtained at Law there is no necessity of going into Ch^y, & it is now necessary to state in a bill in Ch^y that adequate

Nov. 7
18. pm 2.3
3.26. 60.

1 Nov. 28
187.

Nov. Ch^y 24.

Powers of Chancery

relief cannot be had at Law - else the bill is admirable.

But tho the contract is in its nature such that an adequate remedy might be had at Law if any could be had, yet if under all the circumstances of the case it appears that a Ct of Law cannot give adequate relief Chy will interfere whatever the nature of the contract may be. There are certain cases where Chy interferes of course because relief cannot be given at Law - There are others where it interferes on account of the nature of the contract being such that Law cannot give adequate remedy - Here it acquires jurisdiction collaterally - When therefore it is said that Chy will not interfere where adequate relief may be had by Damages at Law, it is not meant that Chy is ousted of its jurisdiction under all circumstances of the case.

another genl rule is that Chy will not enjoin or decree a specific performance of a contract respecting personal property, because a Ct of Law can give an adequate relief - The damages given are genlly an adequate remedy, & damages are not to be ascertained by the Chancery conscience - As it respects contracts for money there never is any need of going into Chy -

1 Ves. 447.
2 Eq. Ca. 19.
10 Wms 570.

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183.

This is not an universal rule; it must be regulated by the particular circumstances of each case; & qualified or modified by this genl^l exception - that where the ends of Justice plainly require a specific performance, Ch^y will decree it, altho it relates to person^l prop^y, & the party wishes it. The presumption is that damages are an adequate remedy, for a breach of a contract respecting person^l prop^y, but this presumption may be rebutted & a specific performance required - Thus where A contracted to save B harmless from certain acts L had to perform - as it respected third persons at diff^t times - Ch^y decreed a specific performance because justice required it. If the remedy were to be at Law, it would require an act by B for every circumstance of which L engaged to save him harmless - So the act^l would first be bro^t at L^w in all these cases & L would then have his act^l over of A.

In another case where there was an agreement to sell on one part & to purchase on the other 800 Tons of Iron & payment at diff^t installments. Now there might be many act^l bro^t at Law on this contract, & therefore Ch^y will decree a performance by which this is prevented. Perhaps too the credit of the purchaser depends upon the fulfillment of the Contract.

another exception to the genl^l rule viz (where the contract respects person^l prop^y that Ch^y will not decree it is where fraud is mixed with the case viz. Ch^y will

3 Atk. 483.
1 Vern. 189.
189 Ca. 393
2 Wms. C. 217

3 Atk. 383
1 Vern. 201.

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decree a specific performance - as where there is a claim of damages & a counter claim on the other & a further one on the other - as where A brings on acct at Law agt B. for a breach of Covenant, B files an injunction agt A in Ch^y because the contract was made by fraud - Now as B has led him into Ch^y A may file his cross bill, & pray relief there Ch^y if they find no fraud will decree relief In this case damages might have been given at Law.

1 Mac. 69
526.

2 Bar. 216.

And if to a bill put on a contract of a personal nature the Def^t does not demur on the ground that relief ought not to be had in Ch^y but files an answer Ch^y will decree because Def^t waives all right to the objection & jurisdiction is admitted.

Gille. Eq. Rep. 227
2 Bar. 215.

on the other hand if the agreement respects an interest in Land or stipulates for some act in franchise to be done, Ch^y will regularly decree a specific performance, because damages at Law are not of course an adequate remedy -

1 Mac. 526

1 Pond. 274. 357.

2 Bar. 219.

10 Wm 282.

A voluntary agreement however of this kind will not gently be enforced - In fact the rule must be understood with the qualification before mentioned -

If then A enters into articles of agreement with B in which he covenants to deed a farm of Land to him upon subject consideration within a limited time & afterwards refuses - B will compel him to convey the legal title to him by Bill in the

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Nov. 24

in Ch^y - all that B could do in Law would be to recover damages which might not be an adequate remedy - and when the reality is on one side & the personalty on the other Ch^y will decree a specific performance by a Bill filed by either - and this is just & equitable - The same Ch^y ought to be open to both parties & the remedy mutual

But here I would observe that a conveyance or agreement to entitle the party to a specific performance in Ch^y must be specific & particular itself: & hence a gen^l covenant to convey lands without mentioning what lands will not be specifically enforced in Ch^y. The intended seller is a trustee to the intended purchaser & therefore the latter has a lien upon the Lands. But in this case he has no lien upon the Lands because they are not specified - He has no equitable title any more than there can be a legal title in Lands not specified in a Deed. In fact there must be an equitable lien.

Nov. 35
11 Nov. 450-

Sect. 5th

I have been endeavouring to inform you what contracts & under what circumstances a Ct of Ch^y will enforce a specific contract - Further - as a gen^l rule he who demands the specific performance of a contract must show that he is ready & willing or has performed his part - or in other words - he who seeks Equity must do Equity. In a Ct of Law there are what are called conditions precedent & those which are called conditions subsequent - Now here where the Off^r's right of action is to receive by some act of his own he must aver performance or what is equivalent to it - But in Ch^y he who seeks the specific performance

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of a contract, must show that he has performed his part, or what is equivalent to it, in other cases beside where the condition is precedent, or where he is not bound to do certain things before a remedy can be had in his favour of the other party. Thus A covenants to convey Land to B who covenants to pay for it - Now at Law A may sue B or B, A, without averring performance; But in this case Chy would not decree a specific performance unless there was such an avowment or its equivalent -

This difference is not founded upon a difference in construction in the two acts. It lies in this - The remedy at Law is stricti juris. A Ct of Law must interpose when such a covenant is broken is debito justitiae - But the Chancellor interposes or not according to his discretion - The party therefore must do equity before he can have it -

Another gen^l rule under the present branch of the title is that where the Chy to a Bill in Chy has done a part of what he is bound to do & is prevented by subsequent events from performing the residue, he cannot obtain a decree of the other party - Thus, where A agreed to pay B £1000 within two years in consideration that B would marry his daughter & settle a jointure upon her - B married her but she died within the two years, after her death, B filed a bill in Chy to recover the money from the father - but the Ct would not interpose & dismissed the bill - The Chy here covenants to do two acts, one of which only he performed.

1 Boull. 383.

1 Ch. Cas. 302.

1 Ves. 87.

1 Wm. 819.

Lalk. 112.

1 You. 385.
Gill. Rep. 188

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Thus L. was prevented from doing the other by the act of God: but it was a conviction precept which does him no injury -

2d. Hovechurch's case is of the same nature - a marriage agreement was entered into between himself & his father in law - he agreed to settle upon his intended wife a manor to the heirs of their bodies & certain pensions - He married her, settled the manor & before L. had settled the pensions she died without issue. He then filed his bill in Chy to recover the £2000 & an. the sum contained in the agreement, but the Ct dismissed it. He had not done all L. agreed to do, & altho L. was guilty of no blame L. was no sufferer by what he had done -

This genl rule however is not to be understood with qualifications - There are exceptions to it; one of which is where a party having performed in part & being in no default for non performance of the residue is not in statu quo i.e. where by the performance of part he must be a sufferer by reason of that part performance, unless L. has a decree - This was ^{not} the situation of the parties in the two cases above -

Then where there was an agreement between the freighter & owners of a ship, & it was stipulated that there should be freight only on the homeward bound voyage - It happened that there were no goods of the freighter at the place specified to bring home - a bill was filed by the freighter & a decree passed in favour of the owners - for they had performed a part of what they promised -

2 Allen. 35.
Hess. Chy 448.
Win. 287.

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Law. 26
1 Bg. ca. 70.
1 Combl. 385.
1 Hen. 210.
Fre. Ch. 313
Gill. Rep. 70.

They had gone after the goods. Had been at expense in manning & outfitting the ship - unless therefore they could have salvaged the freight. They would not have been in statu quo they might have been locus.

I observed by way of post note that in cases where the specific performance of a contract must show that he has done in fact or that which is equivalent to it - therefore his readiness to perform is equivalent to an actual performance. & this is the rule both at equity & at law. If then the party seeking relief has been ready to perform & the other party would not accept the performance or prevented him from performing, Chy will pass a decree in his favour.

Talk. 112.
Holt. 88.
2 W. R. 1312
4 Ch. 76.

But a Ct of Chy will not decree the specific performance of a written agreement if it has been discharged by parol. It is a good rule that parol evidence is admissible for the purpose of rebutting an equity, & this even of a deed. This rule is peculiar to Equity. But a parol release will not discharge a deed in Chy. The Chancellor has a right to interpose by reason of this extraordinary power i.e. he has a right to interpose discretionally. & on this ground it is that parol evidence is admissible for the purpose of rebutting an equity. But in the case of a deed supposed. Chy does not over throw the deed. The testimony is introduced to inform the Chancellor's conscience whether the party requiring a specific performance has destroyed his right to Equity by a parol discharge -

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189

1 Doubl. 384
1 Ken. 240.
2 Ack. 68. 220.
36 Wm. 40.
1 Pr. Cl. 201. 328.
2 Ves. 299.

The Chancellor upon finding this to be the case only refuses to interfere & leaves the Deed just as it was before. The Deed is not destroyed for a recovery may be had at Law upon it, a hard discharge to the contrary notwithstanding.

Thus if A coveats under seal to convey land to B in six months B discharges him by hard. Afterwards he brings a bill in Equity to compel him to a performance. Here the hard discharge may be introduced to rebut the Equity. It shows in pro conscientia that he ought to be discharged.

again - Where the party in Equity claims a specific performance of an agreement & has for many years let it lie without insisting on performance, he is not entitled to a decree for a specific performance unless the delay is explained by special circumstances it is presumed he has waived his right. At Law this presumption cannot take place. Chy raises this presumption but it cannot on this ground vacate the agreement. A diff' course not a diff' construction is pursued -

But a delay of this kind may be explained by circumstances which shall rebut the presumption & so away the waiver - as if the agreement was a poor marriage to purchase & settle land within three years & covenantor has been in Trade & needed the money, or by reason of the circumstances could not spare it - In such a case it is difficult to rebut such a presumption as this.

But no length of time will prevent Chy from relieving as fraud, nor refuse a Trust - In such a case great injustice is done by Chy not decreeing a specific performance because all of Law will give damages but in the case of Fraud this is not true

1 Ken. 276. 484
2 Cou. 280.
1 Doubl. 321.
2 Ack. 100.
2 Pr. Cl. 82.

1 Doubl. 322.
1 Ken. 186.

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There is no presumed waiver here for no man can be presumed to have acquiesced in fraud -

I have observed that he who wishes Equity, must do Equity. It is to be observed however that the Plff's omission to do his part precisely at the time fixed does not bar him from obtaining a decree in Chy - And the reason is said to be that if the rule were otherwise, this relief could seldom be given - It is said by Lord Ellenborough that this rule has been altered - that Chy requires more punctuality than formerly - I don't know what the late decisions are -

As a Ct of Equity then exercises its discretion, it is a great rule that if the Plff who seeks relief has shown any backwardness in performing his part, he has got no favour from the Ct especially if the circumstances are altered so that the other party may be injured. The rule as laid down is - If he has tripped with the performance of his part - Here then you see the great discretion which is left for the Chancellor to exercise.

But with respect to the necessity of the Plff performing his part that he may obtain a decree against the other party there is a great difference between marriage settlement agreements & all others -

The great rule that Plff must have performed his part in some what a equivalent does not apply here - The issue is not purchasers & in their favour Chy will compel one party to perform his part altho the other has failed to do his - Thus A conveys to with property upon B his intended wife & her issue - B does the same as it respects him & his issue -

1 Art. 12.

4 Mr. Chy 329.

1 East 26-27

5 Ken 528 or 32

Mr. Chy 24

2 East 268.

You to die with^t having done what she covenanted to do -
 the children can obtain a specific performance of the
 coveⁿt from the father in Ch^y. The reason is that the
 children are in no fault for the non-performance of
 the mother - They are as meritorious purchasers as the
 mother. Ordinarily the Plff who requests a decree in his
 favour with^t having done his duty, the answer is you have
 not done your duty. But in this case the children
 were not compelled to do any thing - They were not
 bound to perform what their mother covenanted to do
 therefore they shall have a remedy -

The rule is precisely the same as it respects the wife, if
 she is not a party - Then suppose the parents are the
 coveⁿantees & covenantees - The husband is also a party
 & the wife is not - now the wife's father dies without
 having performed his part, or is insolvent - She shall
 have a remedy at her husband in Ch^y, who
 will decree a specific performance at her husband -
 all she had to do to entitle herself to this remedy
 was to marry -

Geo. Ch. 445

1 Ke. 377-8

2 Pow. 26.

Lect. 6th

I have been treating on the power of a Ct of Ch^y to
 decree a specific performance - In pursuing the
 same subject I would observe that if after an executory agree-
 ment is entered into, a Stat. intervenes which renders
 a complete performance impossible, Ch^y may decree a
partial performance if requested, & the Stat. is consistent with it -

3 Ke. Parl. 6. 339

1 Boull. 209-11.

2 Pow. Gov. 31.

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Thus when a lease was made by a corporation for 60 years & a Stat afterwards made it impossible for them to make leases for more 10 years, Chy decreed that this lease was good for 10 years - This is enforcing what is called the "cy pres" as near as may be - In a Ct of Law this could not be done, nor any thing like it - If the party had sued at Law for a non performance it would have been a good defence to have pled that a performance of it was now made unlawful, & as a Ct of Law cannot appraise a contract it must therefore have given judgment for the Defor.

How. 448. 1000. 282
1 Eq. ca. 18. 372. P. 389.

The same is true where complete performance is rendered impossible by accident or the act of God - Thus A covenants to convey to B a grove of standing timber & before the grant is actually made, a tempest should blow down one half - Here Chy will compel A to convey the residue - & in such a case they will compel the party seeking a remedy to pay in proportion to the part performed -

2 H. 4. 731.
2 H. 4. 254.
2 H. 4. 103. 581.
1 Inst. 219^c
352--

This doctrine of "cy pres" is recognized at Law when the contracts are executed - Here a Ct of Law will decree the contract to be good & that it shall stand. This the formerly doubted is now settled - Thus if A empowers B to limit certain of A's lands when B's wife with remainder upon her issue in tail, the wife should die immediately the party authorized to limit should limit it upon the child

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It will be good limitation at Law. If it were necessary
Chy would order it to be enforced -

This interference of Chy would come to militate agt
the genl rule that a contract the performance of which
is rendered impossible & made unlawful by Stat. in word.

18th. 178.

But upon a fair construction of this Stat it goes no
farther than to render performance unlawful as in
the case of a lease for 40 years, for so long a time -

The rules are therefore strictly consistent.

amb. 740.

18th. 212.

Where one acting under a ~~power~~ conveyance great
interest than in Law a right to convey, the conveyance
or grant will be good in Chy for so much as in Law
a right to convey -

2 J.R. 252.

Thus A has a right to make a lease for 10 years
& he makes one for 20. This lease is good in Chy for
10 years, tho in Law it is not -

And there is a very material distinction to be
taken between the construction which the will give to
certain words in an executory agreement & the
construction which both Chy & Law will give to the same
words used in a contract executed -

The distinction extends to certain cases - where a lease
estate is limited to one & his heirs genl or special. Now
this is a rule of Law settled in the time of Ed 1st that
where one conveys by grant or devise to A for life
remainder to his heirs or his body - A takes an estate tail
& genlly whenever an estate is limited to one for life,

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1 Bro. 99.
 Pearce 252
 1 Howl. 399.
 5 Cr. 299. 320
 4 So. 539.
 6 So. 30
 8 So. 518.

a remainder to his heirs gave a special the person to whom the life estate is limited takes the inheritance. This is the construction given to the words in a contract executed. The reasons why such a construction is given in law are numerous & well founded. For heirs of body are words of limitation not of purchase. Of course they cannot take as remainder men & if they could so take they would take only a life estate for want of words of inheritance applied to them.

2 Don. 41.
 1 Bg. ca. 392.
 2 Vern. 588.
 2 P. Wm. 347.
 3 Br. P. L. 327.
 1 Ves. 298.

If however in executory articles to convey, the same words are used, as to & for life, remainder to the heirs of his body, the words compel the covenantor to settle the estate upon to for life & then upon his eldest son or, & on failure of issue on his part, then to the second son & his issue or —

There is a great difference in effect between the construction of these words in a contract "executed" & "executory"; For in the former case he may defeat his issue by conveying a fee or suffering a common recovery. But in the latter case he cannot do so. For the Law will follow the intention of the grantor or deviser give not particularity. But will so construe the instrument as to give effect to the particular intent of the Grantor or Devisee. Now in the case supposed where the contract is executory it shall be treated in full & the gen^l intent of the grantor is followed since his children will most probably have him

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But in Ch^y it shall be but for life only & his children shall not by any possibility be defeated of the estate - Here the particular intent of the grantor or deviser is followed - as the articles themselves do not in the case of an executory agreement convey the title, Ch^y will do it & so give effect to the intent of the person making it - and they will go further, for if in pursuance of an executory agreement made before marriage a settlement should be actually made after marriage, Ch^y will set it aside & order another to be made - and the reason is, the words in the grant after marriage I am a diff^r construction from the same words used in the executory agreement - they do not therefore consider the agreement as performed -

But if in pursuance of such an agreement as this before marriage the settlement should be made before marriage, Ch^y will not set it aside, unless the settlement is expressed to be made in pursuance of articles contained in the agreement - because the parties being *in jure*, the Ct will presume they made a new agreement - but when this presumption is done away by the expression used in the settlement they will set it aside - It has been D that these rules obtain only in favour of males not in favour of females. There is no reason for this distinction & it is now denied -

In carrying executory agreements into effect specifically it is a great leading principle that Ch^y considers as

3 Bth. 299.

Call. ca. 176.

18th Nov 1750 note.

10th Nov 129.

11th Nov 178.

25th Nov 1749.

17th Nov 1728.

3 Bth. 371.

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4 Feb. 1859

2 Mar. 1839.

18. Apr. 7/10.

done that which ought to be done" & this from the time at which the agreement is entered into, unless some other time is appointed. This rule leads to very important consequences so that it has been called by Sir Joseph P. Knight the "omnipotent rule" -

Upon this ground it is that an executory agreement becomes a specific lien upon the subject of the agreement & becomes a lien upon the property contracted about - Since the vendor is considered as trustee for the vendee & so are his heirs on his death - Thus when A covenants to convey Land to B, this covenant forms a lien upon that Land - The intended purchaser is vested with the equitable title & A is considered as trustee for B. True A holds the legal title, but B may claim & obtain it out of his hands by applying to a Ct of Eq.

In pursuance of this great principle it is settled that if any person enters into any articles by which he binds himself to lay out money in Lands, or if he devotes money for this purpose & dies, his heirs shall have the money as real estate, altho it was never actually laid out in Lands. It is considered a real estate from the time of the articles entered into. It makes no difference whether the money is by itself - even if it can be identified it shall go to the heir -

2 Jan. 83.

2 Dec. 207.

Feb. 184.

2 Kern. 536.

11 Feb. 175. 197

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The same rule also leads to this in instant consequence
If a woman before marriage has bound herself to lay
out money in Lands, & she marries & dies before she has
actually completed the purchase, the husband shall be tenant
by the curtesy of it - & Chy will order that the sum specified
shall be laid out in Lands which shall be conveyed to him
for life & then to her children, or it will order that he shall
have the interest of it for his life. The reason is grounded
on some quaint notion by which it was anciently decided

2 Vent. 36. a
2 Vern 595.

& it is now become a great rule of Equity - If in this case
if it had been husband instead of wife, she could not have
been tenant in Dower of it. In fact a husband may be
tenant by the curtesy of a trust estate but wife can't be tenant in Dower of
one -

Price. St. 320.
St. 110. 170.
3 do. 221.
2 Nov. 109.

Further, the money thus directed to be laid out in
Lands will have in a degree as real property, & on the other
hand it will not have as personal property to a Legatee -

And it makes no difference in cases of this kind whether
the money is identified, or whether it forms a part of the
general mass of his personal property - In both cases it is treated
as Land -

Lect. 7th I observed yesterday that as Chy considers a donee what
ought to be done, where money was agreed to be laid out
in Lands it will be considered as Land - But they must do
this unless the agreement be positive - So if A entrusts money
to another to remain in his Lands till it might be laid out
for his daughter & his daughter dies, it was held in

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2 Ven. 207.
3 Atk. 255.

that the money was still personal property for there was no express agreement

3 Atk. 258.
1 Ven. 298.

Thus if a man should enter into an agreement to vest a certain sum of money in the public funds, or in Land for his son, at the election of his son & before he makes it, he dies, it will go to his Ex^r as personal property.

2 Wm. 639.
Lalk. 154.
10 Moul. 414.

All these rules hold e converso for if a man having land agrees to sell it for money & dies, it shall go to the Ex^r on the assets of it as personal property & not to his heirs. This is in pursuance of the general principle that Ch^y considers as done &c.

It follows from this gen^l principle that after an agreement for the sale of property such an one as Equity will enforce, the vendor under the article shall be liable for all the contingencies which happen to the property from the time the agreement is entered into, the vendor dying in no fault.

Thus a man covenanted to convey a plantation in Jamaica & before the conveyance was made the great Earthquake destroyed it. It was held that the intended purchaser should suffer the loss. A made an agreement to take a lease from B for three lives & to take a conveyance at a certain time, before the time arrived one life failed. A specific performance was enforced in Ch^y. The ground is, from the

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2d Appr. 41
1 do. 41.
1st. July 186.
2 Nov. 64-5.

time the articles are entered into, the purchaser is consid-
ered in Equity as the owner, & the seller as the owner
of the purchase money.

There is a case in 26th 217 where Sir Joseph
Popham seems to deny this doctrine arguendo; But it is
never decided. He there refuses to accede the specific
performance of the contract, because it was a matter
of conscience, a piece of swindling -

Feb. 437.

There is one of these cases from which it would appear
that this doctrine was denied, but from examination
you will find that there is nothing in it contradictory.

Nov. 79.

Towell remarks, if the contract is not properly a
contract of sale, but merely a contract for a future
agreement with respect to the subject, the property is not
charged in Equity, & these consequences do not follow
from it. By this is meant where the agreement is that
one of the parties shall have the pre-emption or refusal.

With regard to the rule that money directed to be
laid out in Land is regularly considered as Land from
the time of entering into the articles, it is to be observed
of him who is to have the Land when purchased is to be
treated in fee simple of it, he may at his election retain
the money or have it laid out in Land as he pleases.

Thus A covenants to appropriate 10000 to purchase
Land in fee simple for his son. Now if the son dies
his heir in Law will have the money. Still the son
may waive the agreement if there is no objection from

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1 Houlst. 413.

2 Cow. 112.

the opposite party, & if he does & dies the money will go to his Ex^{or}. In this case there are no third persons who are to be injured - But in the case of a Fee tail it is different, for the issue & remaindermen have a claim.

But still to take the case out of the gent rule even when he who is to be benefited by the purchase would be put in Fee simple, he must show his election to consider it as money; for if he does not decide it, & a contention arises between his heirs & his Ex^{or} it shall be considered as Land. It is necessary then that in some way or other he manifest his election - Thus if he declares in his will that it shall go to his Ex^{or} it shall go. So if he devise it away as so much money appropriated for the purchase of Land it will go to the legatee. So hard proof of facts or his own Declaration that he intended it should be appropriated in the purchase of Land is evidence of his intention. So if he see out of the money for this is to rebut an Equity - This election is confined to the Fee simple - It is personal & dies with him. As between his real & personal representatives one cannot make an election in preference to the other. These are the leading distinctions on this subject -

I observed yesterday that this gent principle, viz that profit is considered as transferred from the time of entering into the agreement only in those cases where as Mr. St. G. will receive an specific performance -

2 B. Mon 175.

3 Mo. 221 note

3 Atk. 238.

1 W. Ch. 229

2 B. Mon 177.

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A want of mutuality in an agreement is a decisive objection to a decree for a specific performance in Chy. It is uncertainty in the terms of it, which would make it void at Law also - Yet at Law more certainty is required. Thus where A agrees to sell an estate to B for £1500 less than to any other person, & B did not bind himself to take it - Upon a Bill for a specific performance it was dismissed for two reasons - 1st for want of mutuality. No body knows how much £1500 less than any other purchaser would give, is; & 2^d for want of mutuality B has not bound himself to take the Land.

But if the agreement was originally mutual, no subsequent event which occasions a want of mutuality however laid it may be will be any objection to a decree for a specific performance. This is evident from the cases cited before where the subject of the contract was entirely destroyed.

And where the agreement was to convey an estate in consideration of an annuity, & before the first instalment became due the annuitant died, Chy. ordered the party to convey the estate.

And where there was an executory agreement for the sale of stock & an enormous premium to be given, stock rising high & before the conveyance was made it fell to her, a specific performance was decreed in Chy. - any clear rule of damages -

2 Nov. 233.

2 Nov. 415.

189. ca. 207.

2 Nov. 232

1 Att. 10. n. 102

189. Chy. 156

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Thus far with respect to the power of Ch^y to enforce the specific performance of executory agreements.

With regard to Penalties.

I observed that in gen^l Ch^y will not suffer an advantage to be taken of a penalty. As it considers it only as the means of enforcing the contract.

From this it is laid down as a rule that when application is made to Ch^y for a specific performance of an agreement, the non performance of which may incur a penalty, it is necessary for the Plff in the bill expressly to waive the penalty, else the bill will be deemedable. To such a bill the Def^t is not bound to answer, & the reason seems to be this, that if he answers & confesses a violation of the contract the Plff might resort to Law & upon the confession of the Def^t obtain the whole penalty, the reason is not because it is necessary to waive the penalty that Ch^y may not enforce it - for this they never do.

It is not universally true that Ch^y will not allow an advantage to be taken of a penalty - where the substance of a contract may be enforced with^{out} the penalty, they will relieve of it, by an injunction if necessary, & in such case will never enforce it - as in the case of a penal bond

as of specific performance

1 Wm. 50.

2 Nov. 204.

2 Mr. Ch. 341.

1 Nov. 171.

3 Atk. 520.

2 Ven. 289. 316.

4 Burr. 2228.

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Here Ch^y upon payment of principal interest & costs will order the obligee to desist from an actual execution.

But when does it happen that the substance of the contract can be enforced with the penalty?

I observe that in general whenever a compensation can be made for a breach of the condition according to a clear rule of damages the subject of the contract can be enforced - as in the last case of a penal bond. There is a perfectly clear rule of damages in this case.

2 Jan. 205.

So in the case of a mortgage - This is not considered as a purchase, but as a pledge - It is the accident the payment of the money is the principal. Here then the object of the parties is obtained by the payment of the principal interest & costs.

Dec 8th I observed yesterday that Ch^y would not suffer advantage to be taken of a penalty, where the subject of the contract could not be enforced - & that the substance could be enforced where the rule of damages was clear.

I would further observe where there is no rule of damages Ch^y cannot relieve of a penalty - In such case there cannot be any compensation according to a clear rule of damages. as where the Lessee covenants not to alienate without the consent of the lessor & a penalty is annexed - viz, a forfeiture of the lease - Here if he does alienate he forfeits his lease - & Ch^y cannot relieve of it, because in this case there cannot be any clear rule of damages -

9 Nov. 182.

2 Jan 205.

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Yet if there is a rule of damages, & by reason of intervening events no compensation can be made as a substitute for the penalty, Ch^y cannot relieve ag^t the penalty -

As where A in marriage articles agreed that if he did not settle a jointure upon his wife within two years, he would forfeit his marriage portion, & he died before the two years expired, here tho the jointure would be the rule of damages, yet the wife is not alive to receive the compensation

According to the rules then laid down if there is no rule of damages by which a compensation may be made - or if there is a rule & yet there cannot be a compensation by reason of intervening events, Ch^y cannot relieve ag^t the penalty - These rules are not independent of the gen^l rule but subordinate to it

Where one party voluntarily stipulates an advantage or favour to another on certain conditions, the latter must lose all advantage from the stipulation unless he strictly adheres to the conditions, altho they operate penally -

Thus if a creditor agrees to take less than he is due, provided the Debtor will pay it at a certain day, he must pay it on that day or he loses all advantage from the agreement of the Cr^r - The stipulation on the part of the Cr^r is purely gratuitous the condition is in the nature of a penalty, but the Sec^y does not in this case like other oper^s unjustly - Altho Ch^y will compel a man to be just in face of a penal Bond, it will not compel him to be Countessful -

1 Vern. 220.
Barnard. 481.
Dec. 24. 160.
1 Vern. 456.

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205.

It is also a gen^l rule that when Ch^y will relieve ag^t a penalty in favour of one party, it will decree & enforce a specific performance in favour of the opposite party.

and on the other hand where it will not relieve ag^t a penalty it will not enforce a specific performance. This is founded on principle of Justice. as Ch^y desires the party of the advantage he might take of the penalty at Law, it will compel the other party to do his justice i.e. to perform his part of the agreement.

So if it consents to convey Land to B under a penalty Ch^y will relieve ag^t the penalty, & at the same time compel a specific performance.

1 Pont. 446
So on the other hand it will not decree a specific performance where it will not relieve ag^t the penalty, because the penalty is the substance of the agreement & therefore good every where. Justice does not require that relief should be had ag^t it. The party can enforce the penalty at Law, which being the substance of the agreement Ch^y will not interfere, because it would give the party a double advantage.

1 Pont. 141

It was formerly holden that where an executory agreement contained a penalty, the party bound had his election to do the thing agreed to be done or forfeit the penalty - & this is now the rule at Com. Law. He may do the one or the other - as in Ch^y - It is

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thus laid down by Lord Thurlow - "Where the penalty seems to be a security for the performance of some thing collateral, so that an enjoyment of the collateral object seems to be the one intended to be secured, they will relieve against the penalty on one side, & enforce performance on the other" - This rule must be understood with the qualifications before mentioned, viz. Whenever the circumstances are such that performance on one side cannot be enforced, & where the substance of the contract cannot be enforced without the penalty, they will not relieve against it - as to the genl rule, see the case of a joint bond which is merely in tenorem - So in the case of a mortgage which is in the nature of a penalty.

Relief is readily had by an injunction ordering the party not to sue for the penalty at Law - This however is not done unless the other party does what he is bound to do.

But where the sum to be paid on the non performance of the agreement is in the nature of assessed damages, they will relieve against it - In such a case as this the penalty is not considered as a security for the collateral object, but as a compensation for the loss of it - The party bound by the agreement has his election either to perform the agreement or to pay the sum stipulated as a compensation for the non performance - Where the com. Law rule applies,

Mr. 1844/18.

3 Dec. 1841.

1 Jan. 1841.

Wey. 4. 5. 1.

18 Dec. 1840.

20. Nov. 1841.

2 Dec. 1841.

2 Dec. 1840.

18 Dec. 1840.

5 Dec. 1841. Can. 417.

2 Dec. 1841.

2 Dec. 1840.

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L. R. 2228.

Thus when in a lease the lessee covenants to plough &c for every acre of meadow he shall plough. Ch. can't relieve of it, because from the structure of the agreement it's evident the obligation was to be on his part. This sum is in the nature of liquidated damages. In such a case Ch. will not decree a specific performance nor enjoin the party not to plough.

L. R. 9928.

But if the lessee covenants then "I agree for myself & not to plough meadow" & at the close of the agreement a penalty is annexed, then Ch. will enjoin the party not to plough; & if he should plough on the same principle it would relieve of the penalty.

Thus much of the nature of the difference between a penalty properly so called & a sum in the nature of assessed damages. Whether the sum is the one or the other of these, depends upon the construction of the whole instrument. Its object must be seen & its good sense consulted.

I observed that at common law where an act was not for a penal sum the whole sum would be given. The common law knows nothing of chancery penalties.

1 Bac. 541.
Com. 387.
3 Bac. 591.
M. M. 130.
Lewin on R. 93.

But now by Stat. 2 & 7 Wm. 4 & 1 Geo. 4 the Stat. of Law are in certain cases allowed to chancery penalties. The penalty is usually double the sum due - It is easy then to ascertain the damages -

Stat. 27.

In some penalties have been chancery by Stat. of Law (under the equity of a Stat.

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When a bill of Equity, whereof a^t pecuniary is frequently made
an issue of quantum damificationis at Law & decree according
to the verdict - In many cases this is not necessary - But
in many it is absolutely necessary; & generally for breach
or nonperformance of conditions, or where the damages.

17 Ed. 4th 2

2 Pow. 214

are in any degree incommensurable. In this case the Chancellor
never does & indeed he cannot assess the damages.

Seect. 9th Have been considering the cases where Chy will decree the
specific performance of contracts; but a bill of Equity exercises
the power of setting aside agreements in certain cases - I would
here observe that when Chy sets aside agreements the relief is
specific. At Law where a contract has been unjustly obtained
after the bill has enforced the contract it will give the party
damages - But Chy will set it aside - & the relief is therefore specific.

Suppose a Bond is fraudulently obtained from another -
There is a bill of Law, fraud was not vitiated it but a recovery
may be had on it - yet a bill of Law will give damages for the
deceit practiced - But in Chy an injunction will issue to prevent
an action on that Bond, the remedy in this case is superior

It does not follow however from a bill of the requesting
to decree a specific performance; that it will grant
relief of the same contract - as if it claiming under
an agreement presents a bill for a specific performance &
it is dismissed, it does not follow that Chy a bill may have this
agreement set aside - at Law it is not so - The contract is

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is forced or destroyed always upon a judgment upon the merits. It cannot refuse to interfere. But at Chy it is discretionary with the Chancellor to interfere or not.

There are many cases where Chy stands neutral -

Thus if upon a Bill for the specific performance of an agreement it appears to the Ct to be unreasonable on the part of the Defd. it will not decree a specific performance altho it is not attended with fraud - & tho they will not decree they cannot set aside the agreement -

There are many more cases where Chy will not decree a specific performance than there are where it will set aside the agreement -

Wms. 143. 225.
Tho. Par. Ch. 20.
5 Vin. 549.

Fraud in obtaining a contract is a good ground for setting aside: & unreasonableness, tho it will not set it aside, yet it is oftentimes evidence of fraud. At Law every species of ^{fraud} will not set aside a contract.

Even in the case of executory contracts by parol a Ct of Law cannot refuse to carry them into effect by reason of fraud in the consideration.

As if A buys goods of B by reason of B's misrepresentation gives more than double the real value upon an action for the price of these goods, it will be no bar to a recovery that misrepresentation was used.

Chy will relieve w^t other contracts & c^{on}tracts obtained by fraud - Thus it is a gen^l rule that it will relieve w^t contracts obtained by imposed Landskip & oppression, tho there is no fraud nor deceit in the case -

12 Vin. 48. 2 Wms. 203
3 do. 240. Kirk. 358.
2 Atk. 324.
2 Ves. 627.

Talb. 41.
2 Lick. 449.
2 Wms. 145.
188.

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as if the mortgagor & mortgagee agree that if the interest is not paid at such a time as some annually, the interest shall be added to the principal & become principal itself, Ch^y will relieve ag^t it.

But if such an agreement is made as between mortgagor & mortgagee, & it is afterwards freely ratified by the mortgagor, he knowing the extent of his rights, that he can be relieved ag^t it will not be set aside. The agreement is not void, but only voidable in Equity.

If a bill of Law is obtained by any kind of coercion not amounting to duress, is good, but Ch^y any degree of coercion is to excite the fear of one of the parties & cause him to act under the impulse of that fear if it does not am^t to duress, will set aside the agreement.

A Forfeiture Ch^y will relieve ag^t a contract which if oppressive is also unlawful, as every suspicious contract is. Here are two grounds for relieving contracts of forfeiture & hardship.

But the rule is diff^t as to illegal contracts, where both parties are equally guilty. The maxim is volenti non fit injuria. Ch^y sits neutral in such a case - i.e. this it will go no further than a bill of Law, ^{and go to} in the case of negligent contracts both parties are here in the wrong - but in the case of an oppressive contract but one party is criminal - the Law does not deem the consumer guilty. -

2 Nov. 152.

30 Nov. 1594

1 Dec. 1727.

2 Nov. 168.

2 Nov. 158.

Dec. 1. 80.

2 Nov. 150.

2 Nov. 155.

Feb. 41.

1 Feb. 98.

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211.

3dick. 283.

1 Vern. 227. 9.

in got any unfair practice on the part of the Pff. to the disadvantage of the Defor. will prevent a decree in his favour - Pff must come into Ct with clean hands.

Thus where there is a misrepresentation as to the value of the subject of the contract, the Ct will not enforce it - but on the other hand will set it aside -

And a suppression of a material truth to the disadvantage of one of the parties, forms a strong objection to a decree in favour of the other party -

"suppressio veri et suggestio falsi" stand on the same ground

as where I wished to sell B land, B wished to buy it,

and succeeded to B that it yielded 200000 which was true, but the land required an annual repair which was not told to B & as B has no means of knowing it - Chy refused to decree a specific performance -

The cases of this kind are where the Pff has brought a bill for a specific performance; but I should suppose that if a bill could be brought for setting the contract aside it could be granted.

So also in some cases where the parties act under a more misapprehension or misconception without any fraud or unfairness on either side, Chy will not only not decree a specific performance, but it will set aside the contract on a Bill brought for that -

See 10th

Mn. Chy. 460

Dec. 6th. 539.

5 Vin. 553.

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As where an agent to sell an estate sold it at a less value by a mistake in the quantity of interest. It was a Free Hold, & it was sold as a Lease Hold.

The rule on this subject however is, if the fact misconceived in the cause of the agent it will be set aside, but if it was such a mistake as would not have prevented the contract from being made as it was made, it will not be set aside.

2 or 3 Br. 644. 20.
2 How. 225
1 Ves. 400.

There is another case which is a very strong & singular one - It appears to me - Less the misrepresentation arose from an ignorance of Law. In such a case Chy will not, & ought not to interfere. The case is this - One of four brothers died leaving a free simple estate. The eldest brother claimed the estate as belonging to him, & the youngest brother claimed it as belonging to him - They agreed to leave it to a School master who having read in a Book that inheritances always descend gave it to the youngest brother - In consequence of which the eldest brother entered into an agreement to divide the estate with him. Afterwards being better advised he had a bill in Chy to be relieved & relief was granted - This is contrary to the genl rule, both in Law & Equity - For if an agreement is written differently from what was intended by the parties, relief may be had in Chy, but if there is a misconception in Law, relief cannot be had -

Mosely, 364.
2 Pow. 196.

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again. It is a gen^l rule that Chy will not enforce a voluntary agreement. Such a one is not binding at Law.

10 Mr. 34.

2 do. 242

1 Atk. 10.

1 W. 138.

The interference of Chy is for the sake of giving more adequate relief than a Ct of Law could do. But in this case a Ct of Law could give no relief, therefore Chy will not give any - for it is a gen^l the not universal rule that Chy will not interfere where Law will give no relief -

1 Atk. 10 10 Mr. 208.

2 Mr. 200.

1 do. 122.

But the compromise of a doubtful right is a sufficient consideration to support an agreement; & where there is such a consideration, the agreement in Equity is never considered as voluntary -

Thus if an agreement is entered between two persons to settle the boundaries of their Lands, Chy will decree a specific performance - This was the case with 2d. Bradburn & 3d. Barn, yet there is no agreement to convey Lands or pay money - but would seem that the agreement was voluntary. This case may perhaps shake the mind as being analogous to the case of the schoolmaster - but they stand on diff^t grounds - A mistake in Law is diff^t from the compromise of a doubtful right - for in the latter case it may not be a matter of Law, but a matter of fact which is doubtful - & it were a matter of Law still it

2 Atk. 587-92.

1 do. 11.

would stand on a diff^t ground. In the case of the schoolmaster the ground of the school was executing the agreement under a mistake in Law - But the ground in the case of a doubtful right is wholly right -

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18th Nov 18391st Dec 41.

Pro Ch. 387.

There is a rule of Chancery that assents obtained by coercion or importunity to Deeds may be set aside - So if they are obtained by means of undue influence they may be set aside Thus where upon a treaty of marriage between A & B. B being a minor & in possession would not consent to the marriage unless the husband would release him the liability for the same, property of the wife. What he did it & only set it aside -

But more filial fear, reverence or respect is not itself a ground on which relief may be had. But if the reverence is should be made use of for the purpose of obtaining the Contract, it would be set aside.

Intoxication in the party at the time of entering into the Contract is not a sufficient ground for setting it aside. unless the party claiming benefit under it produced the intoxication for the purpose of obtaining it - The ground of relief would then be found under - the intoxication per se.

18th Nov.30th Nov 1840 note1st Dec. 39.

And if one party should get the other intoxicated & then make a contract with him, it should be a fair one. It will not enforce it, because in some cases it will be clear that the other would set it aside on the ground of fraud.

Again - Where weakness of understanding of the party

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be legally competent to not per se a ground
for setting aside a contract. The Court cannot
discriminate the shades of intellect in men. The
one may in a fit, Law is not a letter and he is to be
more understanding than the other. The rule established
by Law is that if he is legally competent his
weakness of understanding shall not be the ground
of relief. There must be some fraud or other
circumstances would be vague & uncertain.

3d May 1797.
Law 30.

But want of understanding may be presumption
evidence of fraud. The only difference between Ratification
a contract made by this man & any other is that
in the former case the will give relief upon slighter
evidence than in the latter case -

Lect 10th It is to be observed that agreements, operating as
a fraud upon third persons are always set aside
in Chancery. This is one of the strongest grounds for which
the will set aside contracts. Such an agreement is now void
at Law. Thus where in an agreement in contemplation
of marriage the latter on one side agrees
with the father on the other to settle \$1000 of L. will
do the same. Now if there should be a clandestine
agreement by one of the parties on the one to release a
debt to the father. This agreement is void - it is illegal -
for it is a fraud upon the other party -

Now 105. 175.

1 Bq. Ca. 88.

1 East. 156.

1 Wm. 348.

2 Ves. 375.

Buck 95. 280.

5 D.R. 168.

2 do. 103.

14 Bl. 320

58-7.

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at antea

And here upon an agreement with a Banker that the Bank agreed to take on Holdings on the ground of the Bankrupt to induce some more aged loan to agree to his covenanted to some time & more on the ground this agreement was void at Law it was a fraud -

Contracts of this kind do not admit of a subsequent ratification. They are at once void - because if this could be ratified this might impose a fraud upon third person. When a fraud is practiced by one party to an agreement on another, the other may ratify the agreement if he pleases. But a fraud imposed upon third person in an agreement cannot be ratified -

2 Bon. 186.

1 Vern. 25. 602.

38 May 75

1 do 426.

There being a treaty of marriage depending there was an objection on the part of the intended husband's relations because the wife's portion was not large enough. It was agreed by her brother that he would execute to her a bond for £500. It was done, & she clandestinely gave an instrument by which she agreed to deliver up the bond - In fact she gave a release of it - The bond had its effect - the parties were married - afterwards the husband but his wife to set aside the release & it was set aside -

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on the principle marriage brokage bond & contracts are void - These are such as where one party agrees to give another a certain sum of L

10 Burr 474-5. will procure a certain person to marry him. These are void because they lead to fraud, undue influence & misrepresentation. Strangers should not interfere in such things - I believe all Lams they would be void -

1 Doubl. 245.

Contract with Linc apparent for three or four years are always set aside in Chy. Formerly they

would not set them aside unless the terms of the contract were disadvantageous to the Linc. But the rule is now altered - They are radically defective - I do not mean to say

where one whether the Linc apparent was an infant or not at the time of making the contract. This rule is founded on considerations of public policy -

These contracts tend to dissipation & lead to vice - They render Linc independant & their ancestors & excite rebellion against parents -

And if after the death of the ancestor, the Linc should perform the contract by actually conveying the inheritance Chy will in many cases set it aside

But not always - and the rule is, if the original contract is shown to be fair & it appears to be ratified freely, & the Linc has full knowledge that it might be set aside the ratification will not be set aside - otherwise it will be -

2 How. 181

2 Vern 14. 29.

15 Me 340

3 Ho 292.

2 Ho 135.

10 Wm 320. 292

2 Wm. 159.

2 Vern. 14.

2 Wm. 183.

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Under 28 Geo. 3^d Ch. will not enforce a contract to do any thing which will tend to oppression extortion or immorality. The thing itself need not be immoral, if it would tend to immorality it would not be enforced. I should think upon a bill for that purpose it would be set aside. The case cited to establish the rule is one where the Plaintiff sought to enforce a contract & the Chancellor would not enforce it.

28 Geo. 3^d

28 Geo. 3^d

In the same case the contract also stipulated for an assignment of the tobacco office - this was not enforced, because it tended to immorality & drunkenness.

Thus far of the power of Ch. to vacate or set aside contracts.

Ch. exercises the power of decreeing a set off a thing unknown to the Com. Law. At Law the contracts are entire & distinct, as where A owes B \$100 by note & B owes A \$100 by similar contract. However acted by A B cannot at Com. Law plead a set off of his debt of \$100 by note - but two Stat. 28 Geo. 3^d he can thus plead - but Ch. can decree a set off. These set offs are equitably necessary where one of the parties is insolvent - Ch. will not always however decree a set off.

In Com. Law it is in the constant practice of decreeing set offs.

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It is impossible for a Jst of Law upon any principle of Law to consider a suit off as any defence - They have only to consider whether the contract was made whether it is a good one & whether it has been discharged - Because the Def^t has a Debt at the Plff's Suit there is no payment or discharge at the Plff's Debt -

Under Chanc^y Stat. on the subject of Chanc^y proceedings original proceedings in Equity are to be brought before the Court amounting when the thing demanded exceeds £500 - Between this sum & £100 Just^{ices} take notice under £100 but £100. I think there is no case but before Just^{ices} where there was any objection that the sum was too large - Indeed the provisions in the Stat that Equ^{ity} shall have cognizance over £500 is a disgrace to the book - In our Chanc^y proceedings there is no appeal from one Ct to another - but a writ of Error will lie -

In Equity there is no writ of Error but an appeal. Where the value in question is doubtful the alleged value determines the jurisdiction -

Power of Chanc^y to issue injunctions

The nature of an injunction has not yet been explained - An 'Injunction' is a prohibitory writ the object of which is to restrain a person from doing a thing which appears to be contrary to Equity & Conscience -

3 Dec. 1792

Powers of Chancery

Injunctions are issued in a variety of cases -
 The most usual writ of injunction is that issued
 ag^t a Def^t to stay proceedings in some suit at Law -
 This issues upon some equitable grounds not admitted
 to in Ct of Law - i.e. upon some grounds upon which
 a Ct of Law cannot take notice - as in the case
 of a heral Bond which is sued in a Ct of Law the
 Def^t may bring a Bill in Ch^y praying that an
 injunction may issue to stay proceedings upon his
 praying principal interest & costs.

9 Jac. 179.

6 Mod. 6
 3 Bac. 143.

But Ch^y can issue no injunction in any
 Criminal case whatever - The right enforced in
 Ch^y & the wrong redressed are civil.

Ch^y may issue an injunction to stay waste -
 i.e. to prevent him from committing waste -
 as cutting timber, demolishing buildings &c -
 Ct of Com. Law can only give damages for the
 waste committed - But Ch^y may give a preventive
 remedy. The damage given at Law may be very
 inadequate - This injunction may issue either
 in favour of the remainder man or
 Reversioner -

2 H. 288.
 1 Simb. 29
 124 24
 2 Ann. 5.
 Br. 344 &c

Powers of Chancery-

But an injunction to stay waste will issue not only in those cases where an action of waste will lie at Law. But in many others - At Com. Law waste lies only for the immediate remainder man or reversioner - In Eqy a remote one may have the injunction - The reason in the former case is if it would so at Law the remote remainder man would destroy all the intermediate remainder men for he would receive the Land. But in Eqy the Land is not recovered - the injunction is only a preventive remedy It does not put the remainder men nor reversioners into possession of the Land -

An injunction to stay waste will issue in Eqy in case of a mortgage. A mortgagee in possession can never be sued by the mortgagor in an actⁿ of waste. For he may commit waste - But in Eqy the mortgagee has only the equitable estate & therefore he cannot commit waste - An injunction will of course issue to stay waste - And I should suppose in the case of trustees for example even if it were to be said some & applied to the payment of the debt it would be the foundation of an injunction - at any rate if not so applied it will issue -

2 Bl. 224

1 Vern. 23.

3258 74

723.

Feame 450.

Uben. 87.

3 M. 723.

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on the other hand an injunction will issue in favour of the mortgagee of the mortgagor - an actⁿ will not lie at Com Law, because the mortgagor is considered as Tenant at will - & some when he commits waste, he immediately determines his estate - He is then a trespasser, all privacy of contract being gone - But Chy will issue this injunction - for the mortgagor has no right to diminish the value of the pledge - There a remedy may be had at Law in an act of Replevin - but this might be inadequate

3 alk. 722.

10. Wm 75.

Again - an injunction of waste may issue of ten for life witht impeachment for waste as the case may be - At com Law no act of waste would lie witht impeachment for waste -

Wm. 23. 2 do 738.

Salk. 107.

Salk. 51.

2 How. 69.

2 Wm. 84. 89.

For cutting timber an injunction will not issue - It will issue only for great & outrageous acts of waste -

And in a case of this kind, if the lessee commits waste by demolishing or partly demolishing a building,

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2 Vern. 738. Chy will decree a specific relief for the injury
 In. Chy. 454. done, by ordering him to repair the building &
 1 Rep. Cas. 488a but it is in the plight in which it was —

And an injunction may sometimes issue
 to stay waste of him who has the inheritance
 at Law — as a Trustee. Now at Com. Law the
 act of waste lies only against him who has the
 inheritance as one who has only the estate
 for life or years — But the trustee has the
 inheritance, because the cestui que trust is
 not known at Law — His title is a mere equity
 & as it is so Chy will order the trustee to perform
 the trust, as to convey the legal estate, or to
 stay waste which prevents him from violating
 the trust.

2 Com. 51. —

an estate at Law will not lie against a Tenant in
 tail after possibility of issue extinct — But Chy
 in this case will issue an injunction to stay
 waste. This man is in the same plight with
 Tenant for years without impeachment of waste — If
 the waste is outrageous an injunction will
 issue —

1 Eq. Ca. 221.

2 Com. 50

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Lect 11th Injunctions may also issue to restrain
 nuisances - as if one is about to raise a
 building which will obstruct ancient lights an
 injunction will issue to prevent it - at Law
 damages might be given when the building was
 raised - The lights must be ancient or no remedy
 will be had either in Eq^y or at Law - Ancient
 Lights are those which extend beyond the memory
 of man - The right must be founded on
 prescription or agreement of the parties or those
 under whom they claim -

2 Ves. 452.
 1 Exch. 24.
 20. Me. 266.
 1 Ves. 453.

It may be here observed that the lights are
 not in point of fact ancient lights within the
 term yet where one has built & his lights look
 upon another's Land & they have been enjoyed a
 considerable length of time a Jury will
 presume an agreement -

An injunction may issue to prevent one
 from building on another's ground -

Eq^y will not however consider as a nuisance
 for the purpose of issuing an injunction, that
 which is not at Law a nuisance for the purpose
 of supporting an action -

2 Ves. 44.
 3 Atk. 450.
 1 Exch. 24.
 2 Ves. 137-40.

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on the ground an injunction will not issue to prevent one from building a post house. For this is not a nuisance at Com. Law. —

A writ of injunction will not issue to stay common trespasses, because damages given at Law are equivalent. If of that are continued for a length of time so as to become a nuisance an injunction will issue. That which in its inception was a mere trespass may by continuance become a nuisance. An act will not lie at Law as for a nuisance when it is a mere trespass.

3 W. 21.

2 Com. 52.

Relief ag^t an unconscionable bargain & agreement is effected by an injunction; & where the Equity of the Def^t at Law who is Off^r in the Bill arises out of the answer of the Pl^t at Law who is Def^t in the Bill, an injunction will issue to stay the trial —

10 W. 2. 16. 7. 2.

2 W. 174. —

So also in cases where one Judgment in a bill at Law is not a bar to another between the same parties & there have been several Judgments all in favour of the same party & suits are still on, the Court will issue an injunction to quash the bills of the prevailing party —

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W. B. P. 266.
Ch. Ch. 281.

This is the case in action of Ejectment where the nominal Off & Defd may be altered a thousand times: The names of the parties on the records are diff. one act is not a bar to another for the same cause. It was once held that Ch. J. could not interfere in such a case but the decision was reversed.

W. B. P. 266.
2 Act. 282.
3 Pra. 174.

There are also other cases where an injunction may issue to quiet a person in the possession of his estate; as where L. has a plain equitable title & Ls. been in possession for a length of time - as certing que trust who has had the possession for many years.

Ch. J. 104. 127-8.
W. B. P. 266.
1 Act. 282.
2 do. 484.

An injunction may issue, except in the case of Ejectment to prevent a multiplicity of suits respecting the same right. When many suits are pending or are likely to happen. Because one act cannot settle the question Ch. J. will issue an injunction & then raise the question within its own jurisdiction & settle it at once - as where there are several parts of a manor claiming the profits.

So where a multiplicity of suits are about to arise respecting the boundaries of land Ch. J. will unite all the parties & settle the question at once.

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and it was on a principle analogous to this that
 case of Broadman & Keyman was decided in Nov. 1818
 that where there were more than two parties an order
 of ref^t would not lie ag^t one of them - as it would tend to
 multiplicity of suits -

So also an injunction may issue pending
 a controversy in the ecclesiastical or between two
 or more persons claiming to be Ext^r of a third -
 Vices to restrain them from acting as Ex^rs
 until the right be determined - There is no other
 way to prevent them than by applying to Ch^{cy} -

An injunction may issue when one
 person violates the literary prop^y of another - It may
 issue in favor of authors or inventors to restrain
 others from publishing their works or imitating their
 inventions. There has been a great question whether
 at Com. Law there is an exclusive right to
 literary prop^y - So decided in R. B. & Don. Proc.

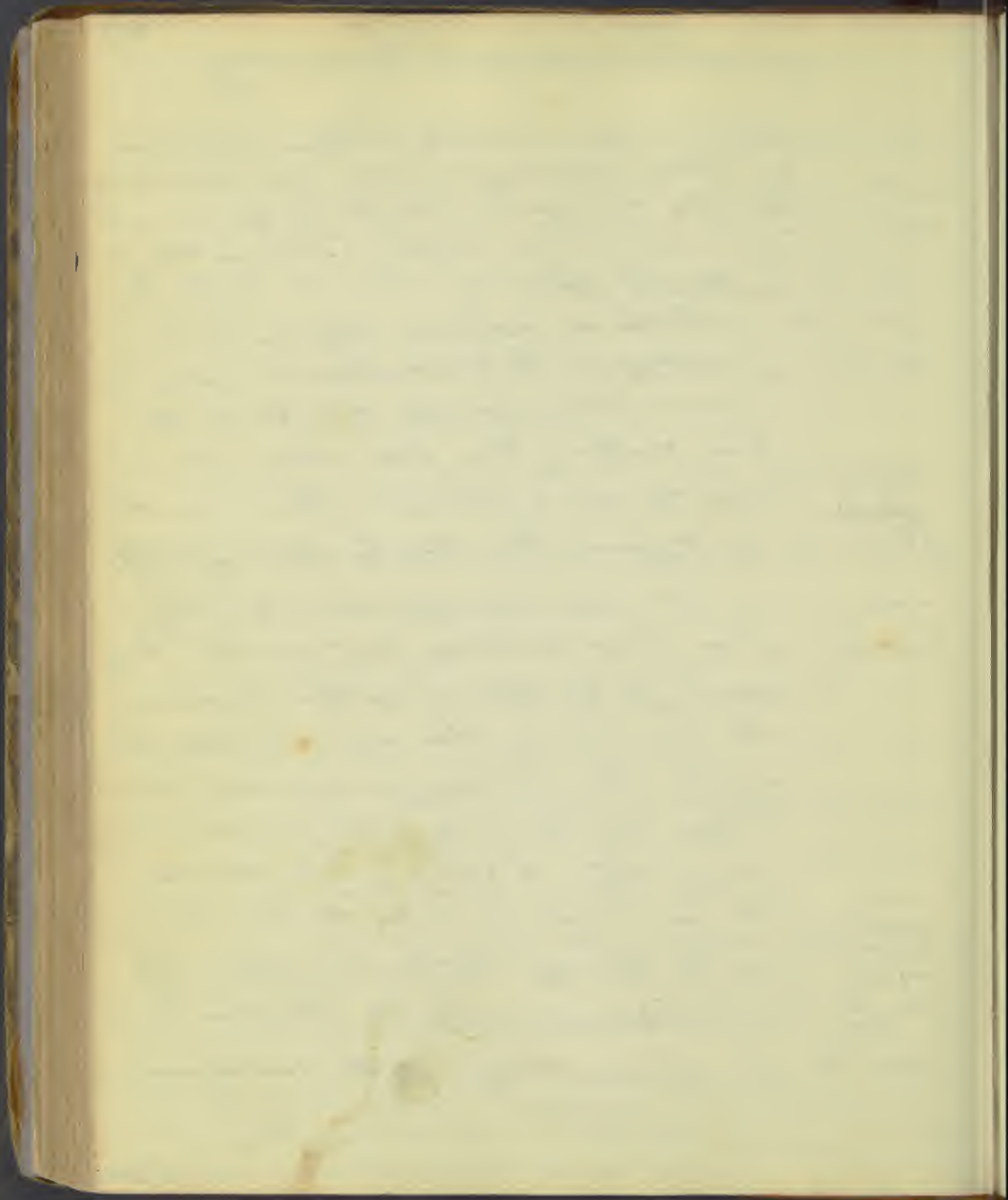
The former decided 6 to 5 that the Com. Law
 remedy took away that by Stat^y of 1811 - Id.
 no objection was among the 5 - Therefore think
 the weight of authority ag^t the last decision -

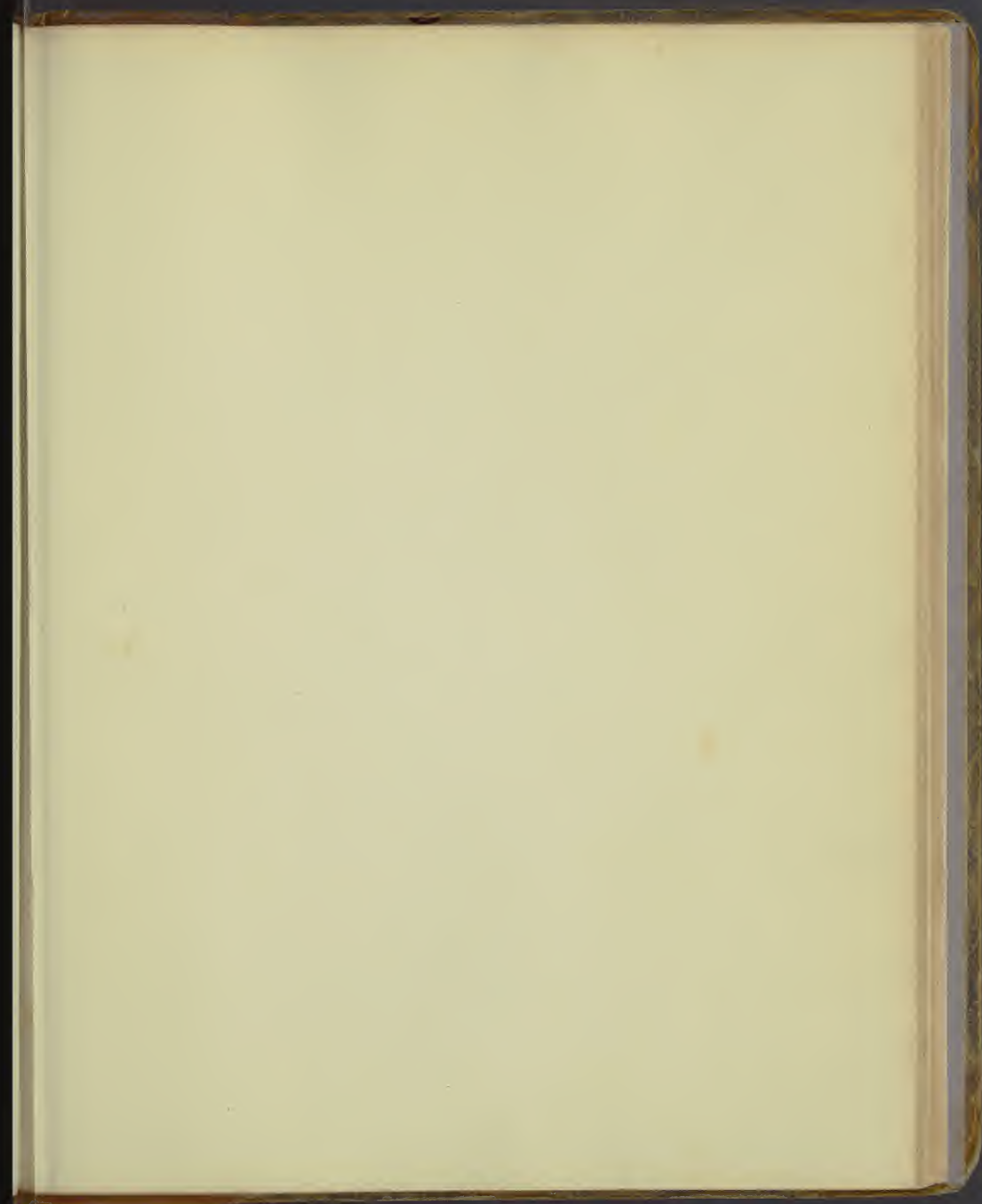
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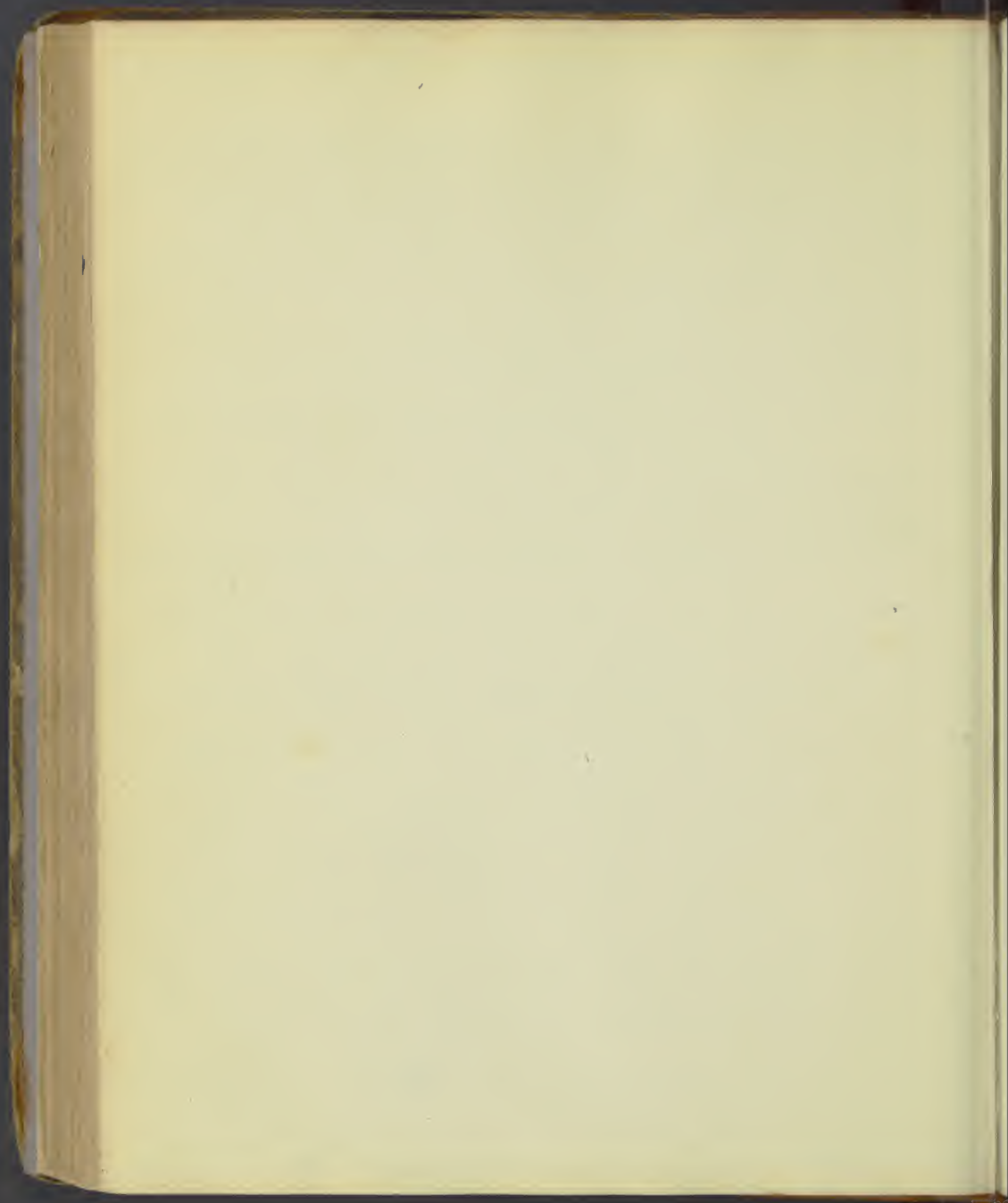
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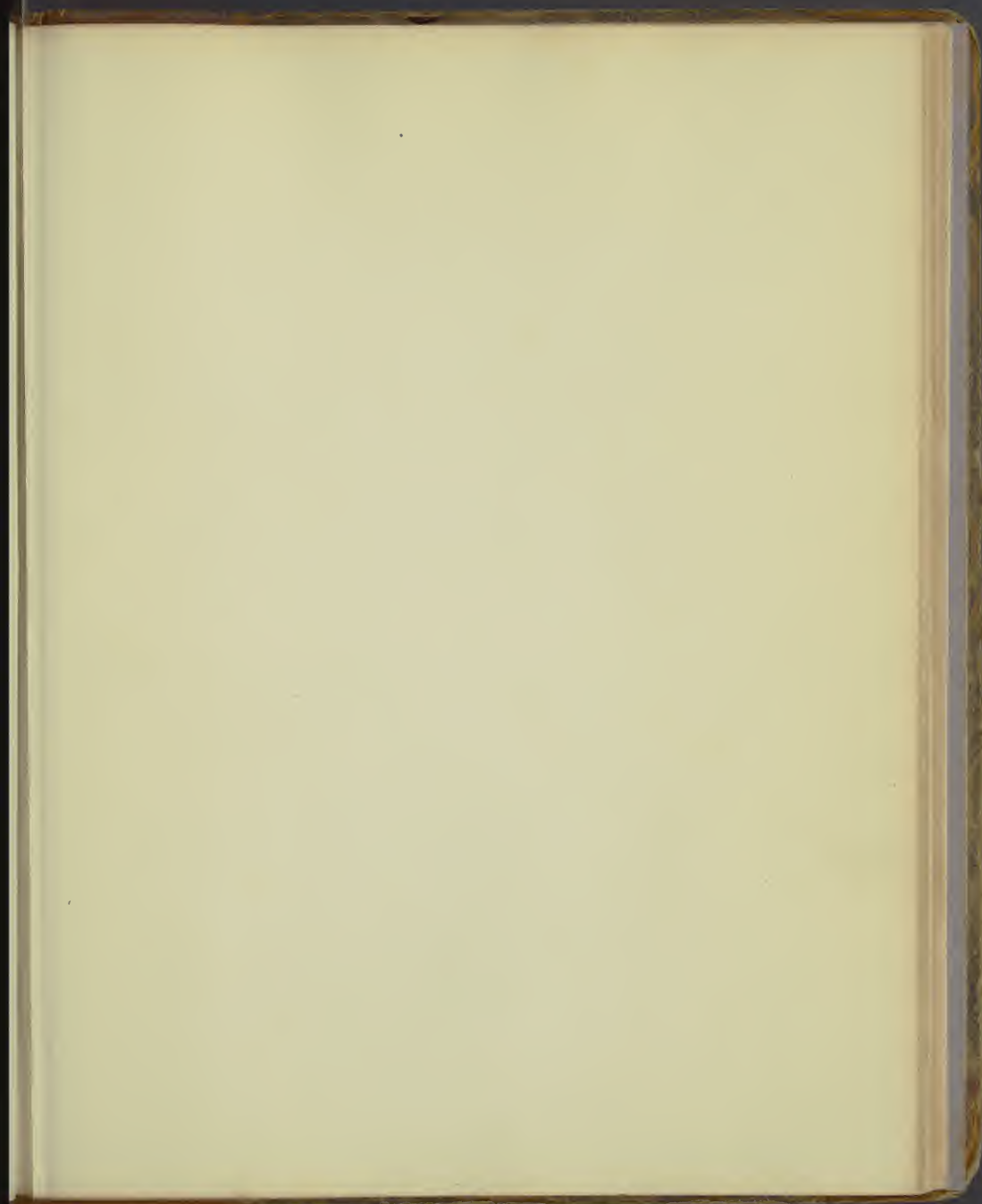
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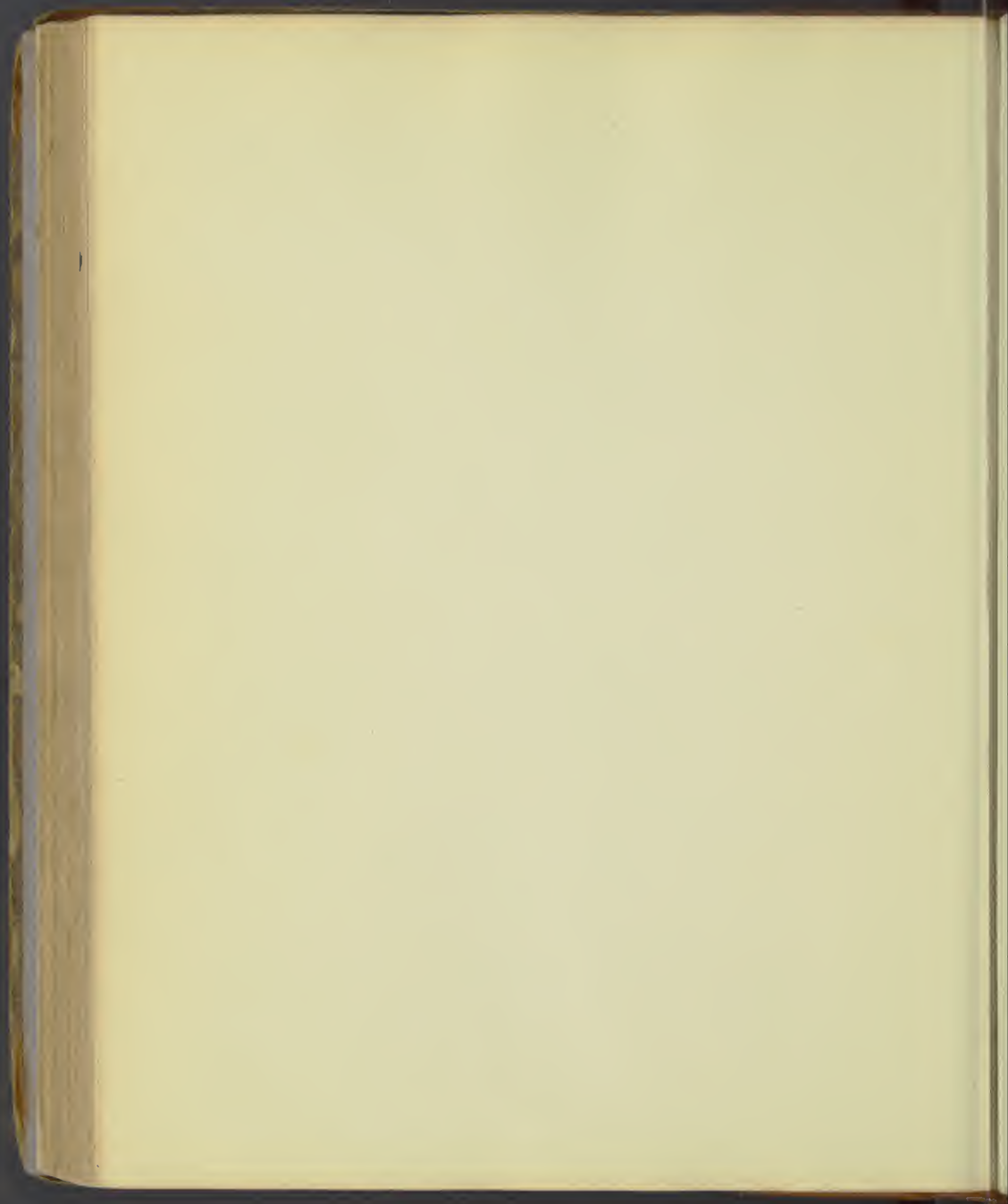
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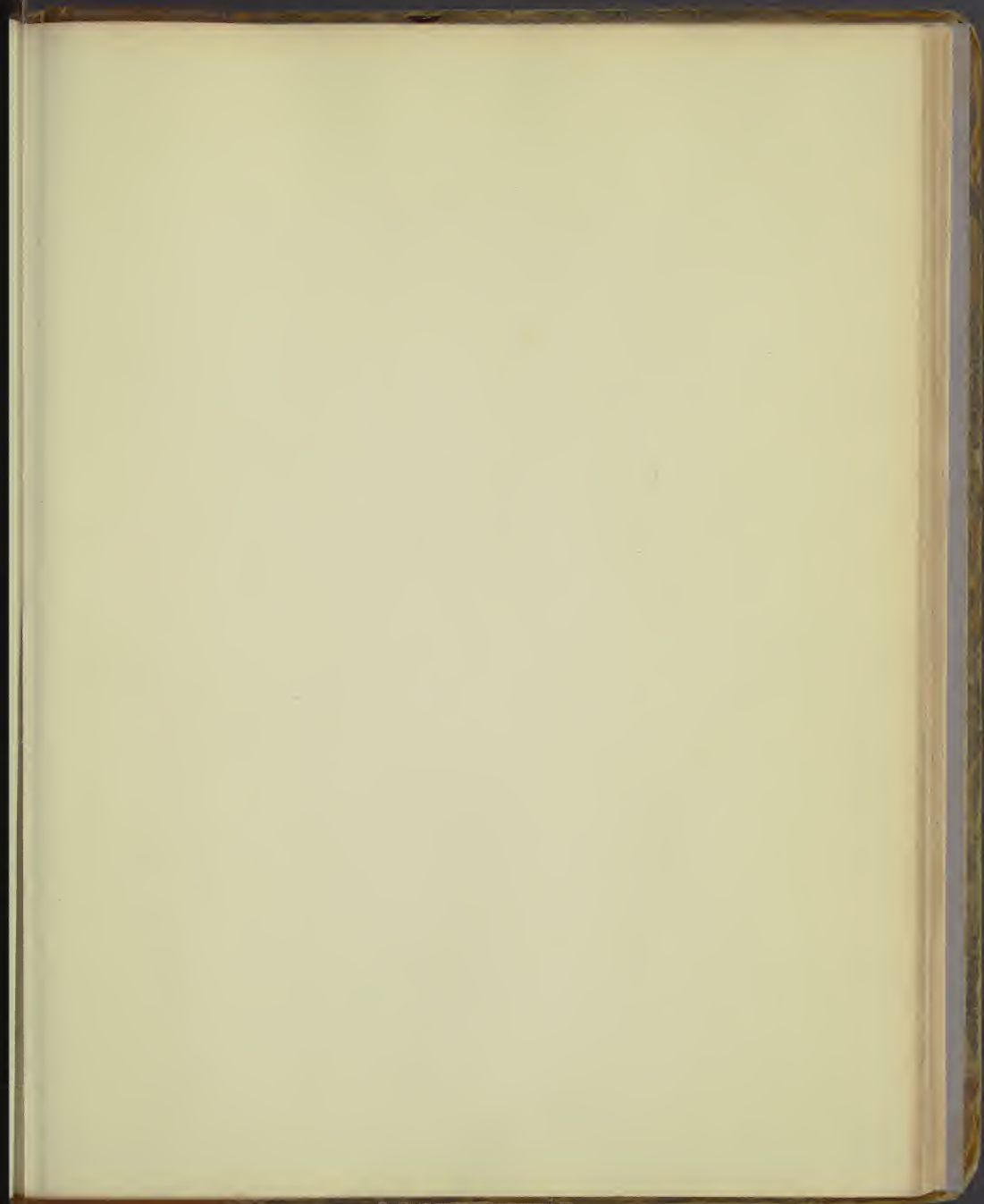


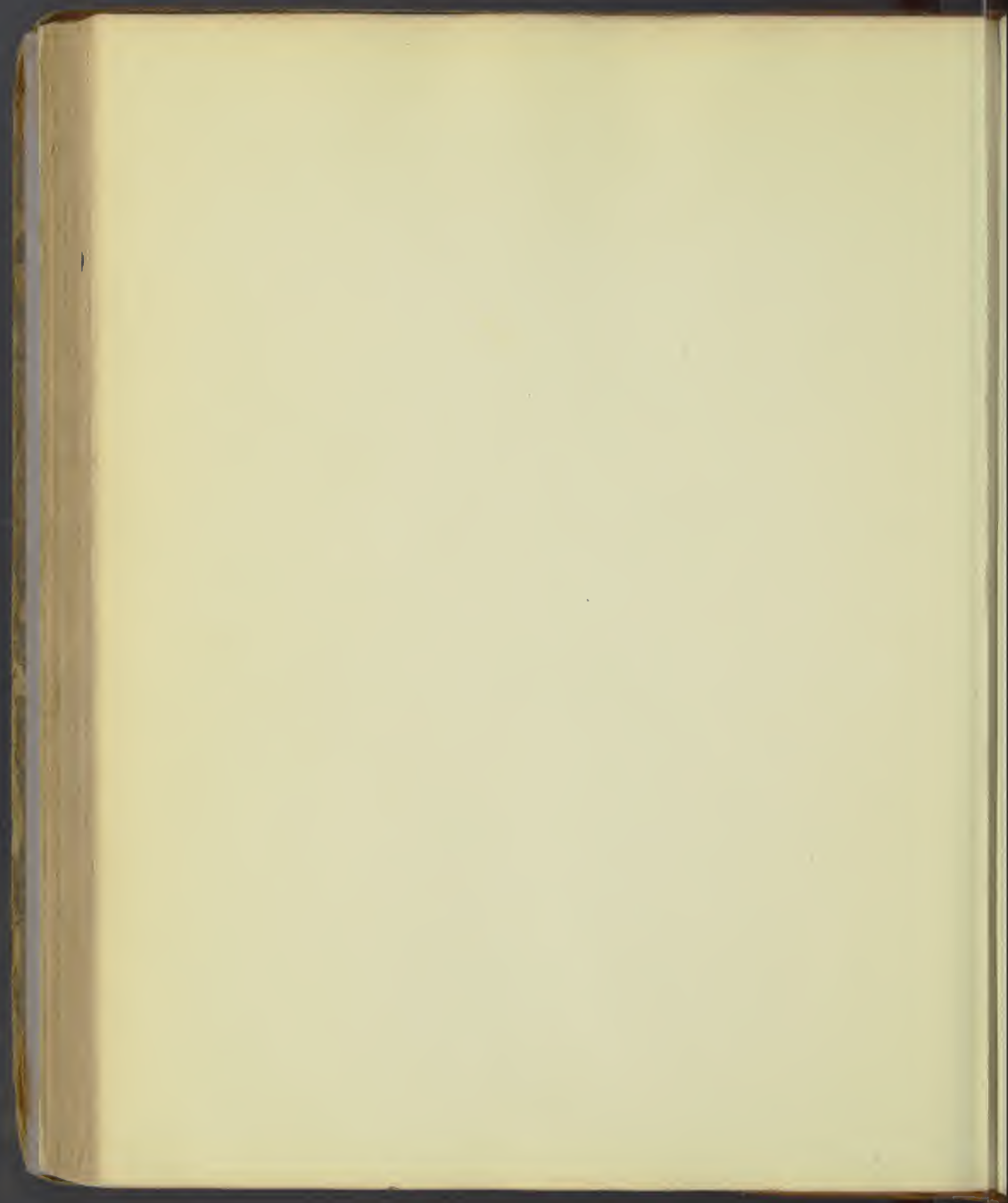


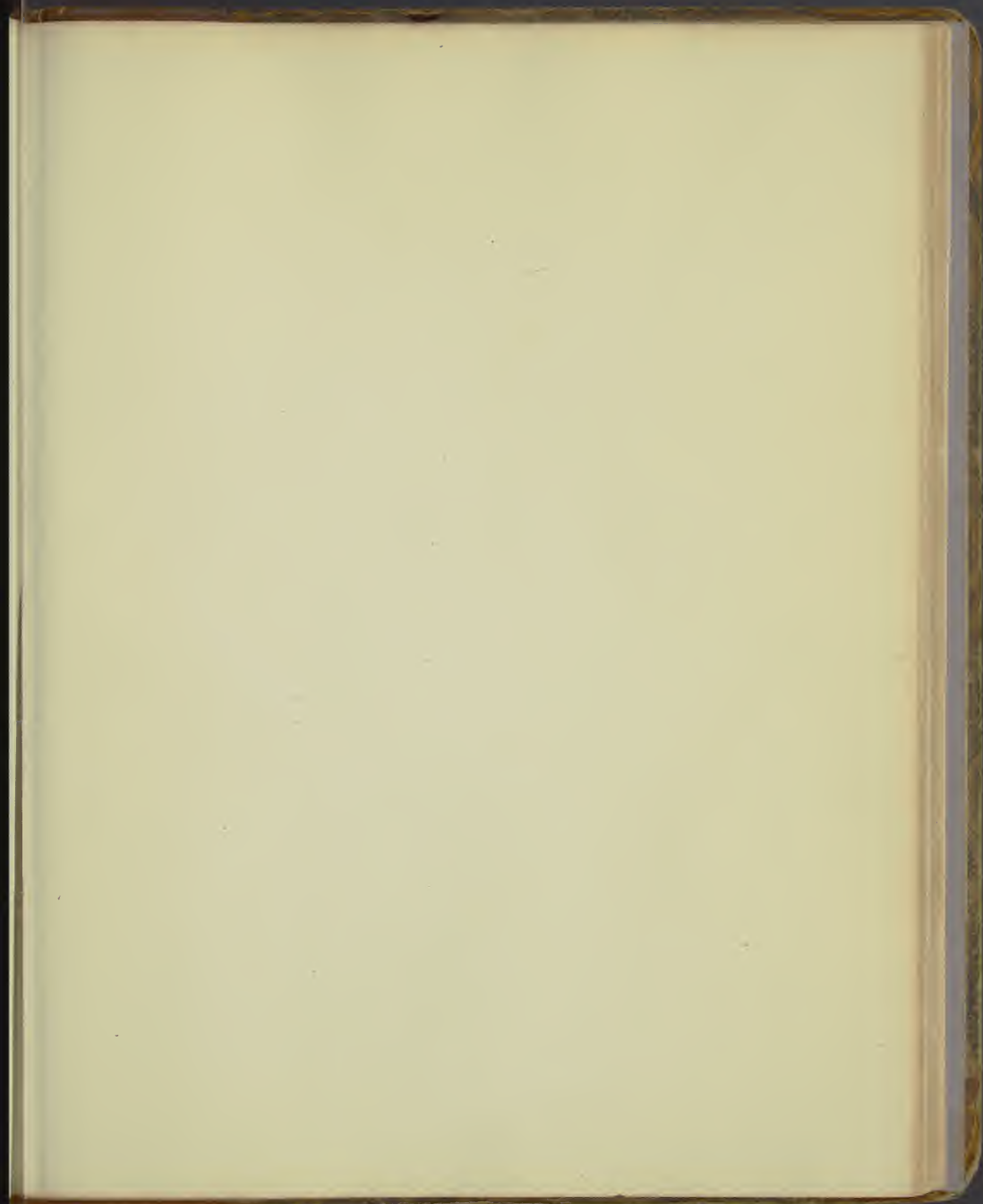


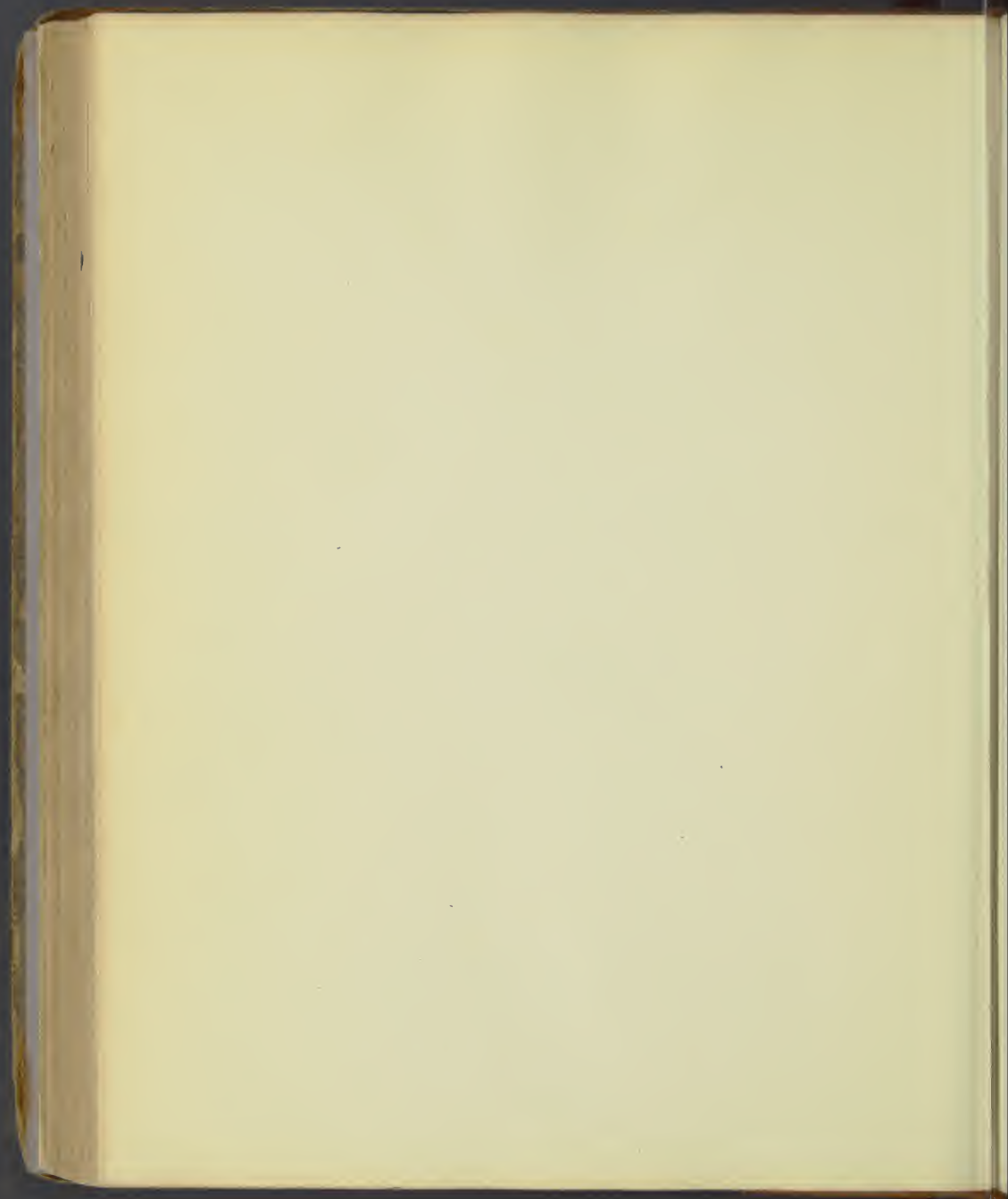


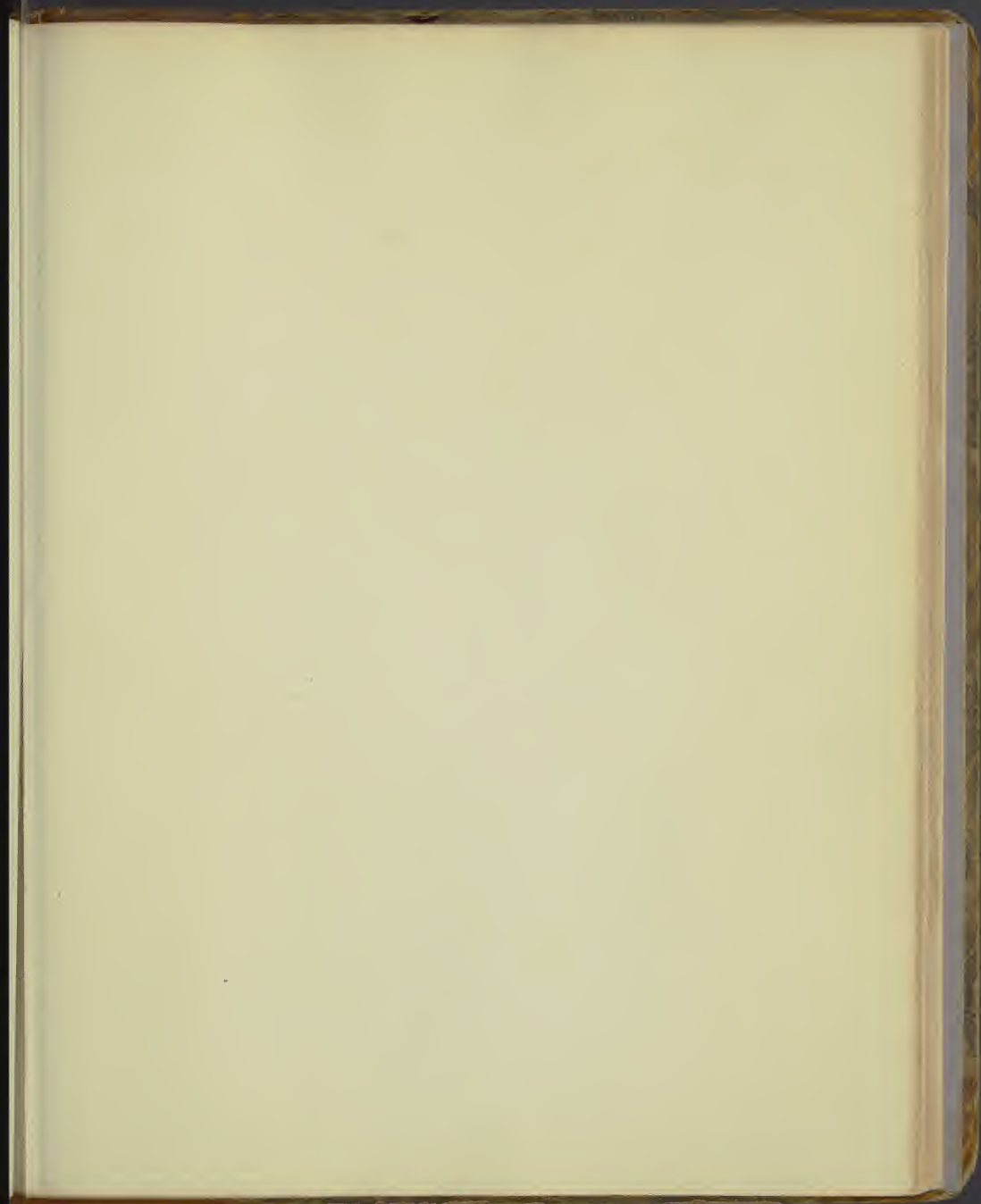


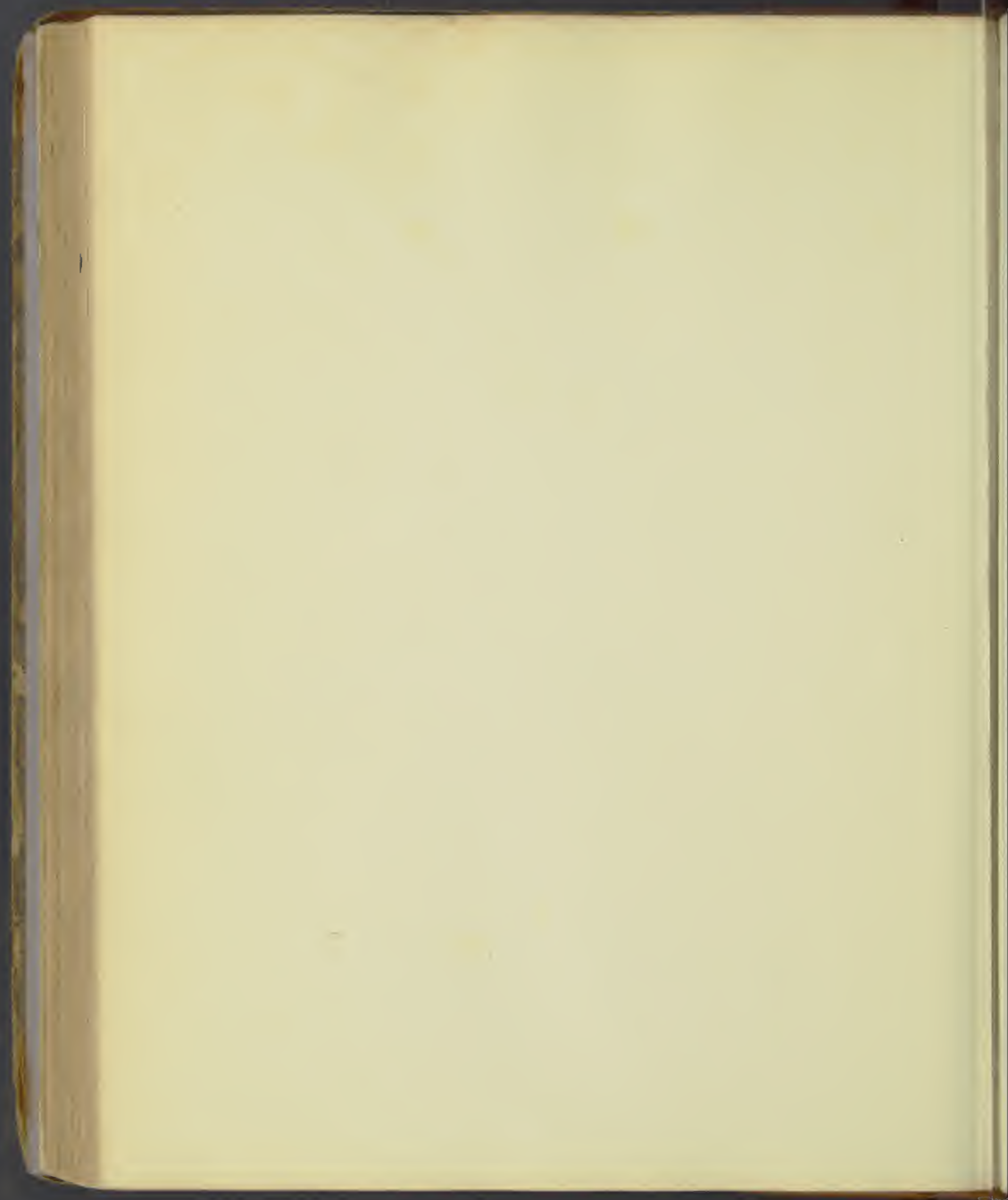


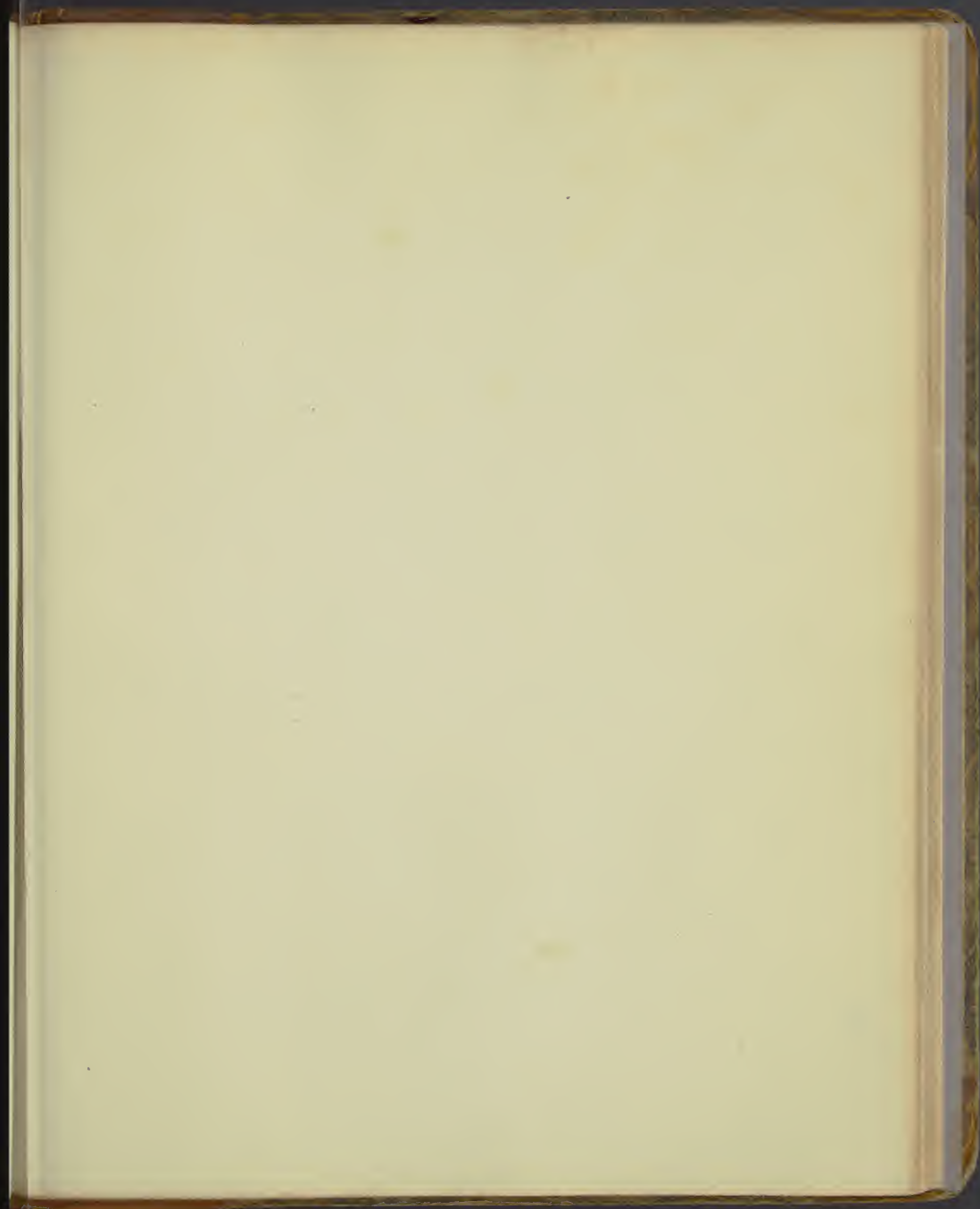


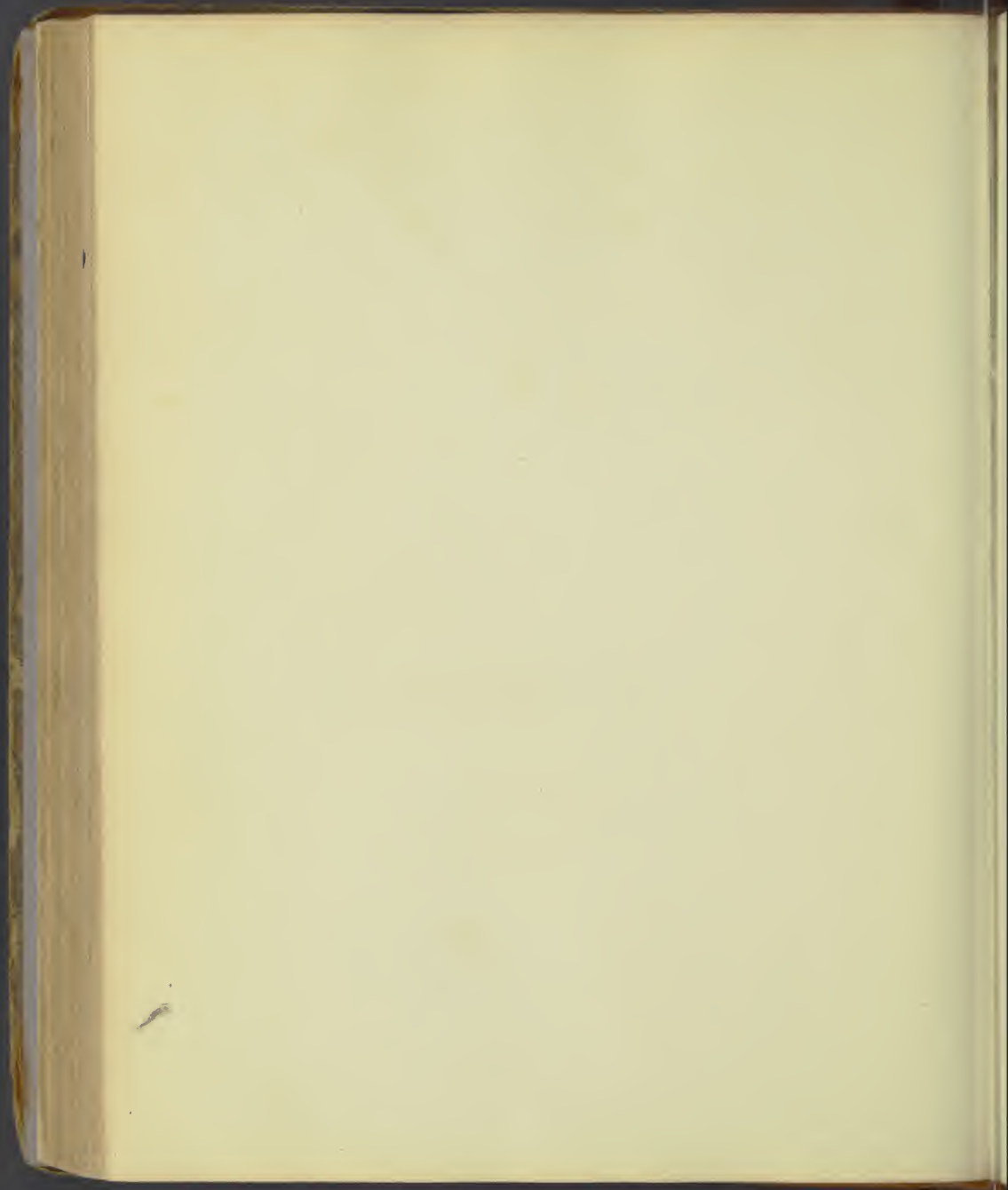


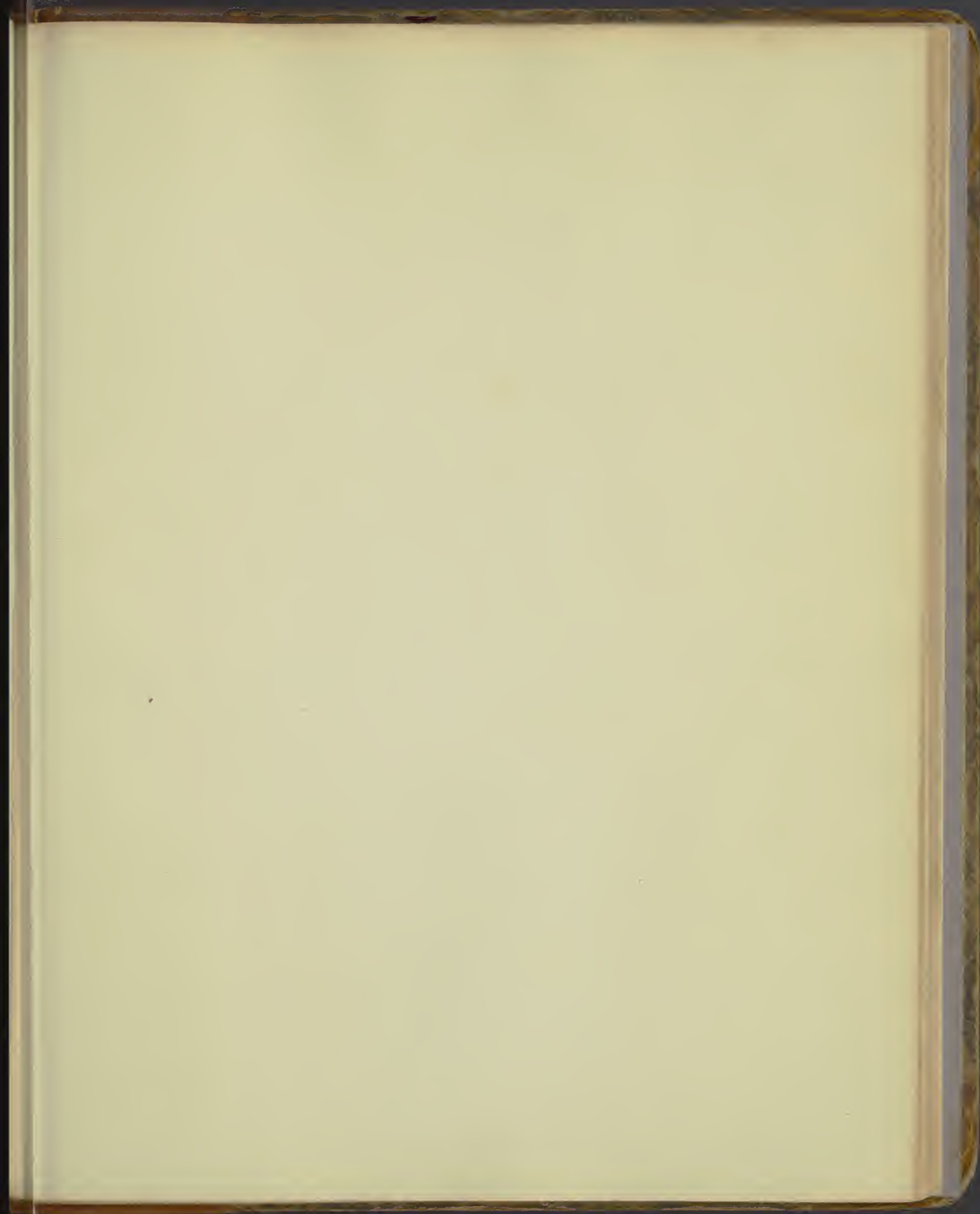


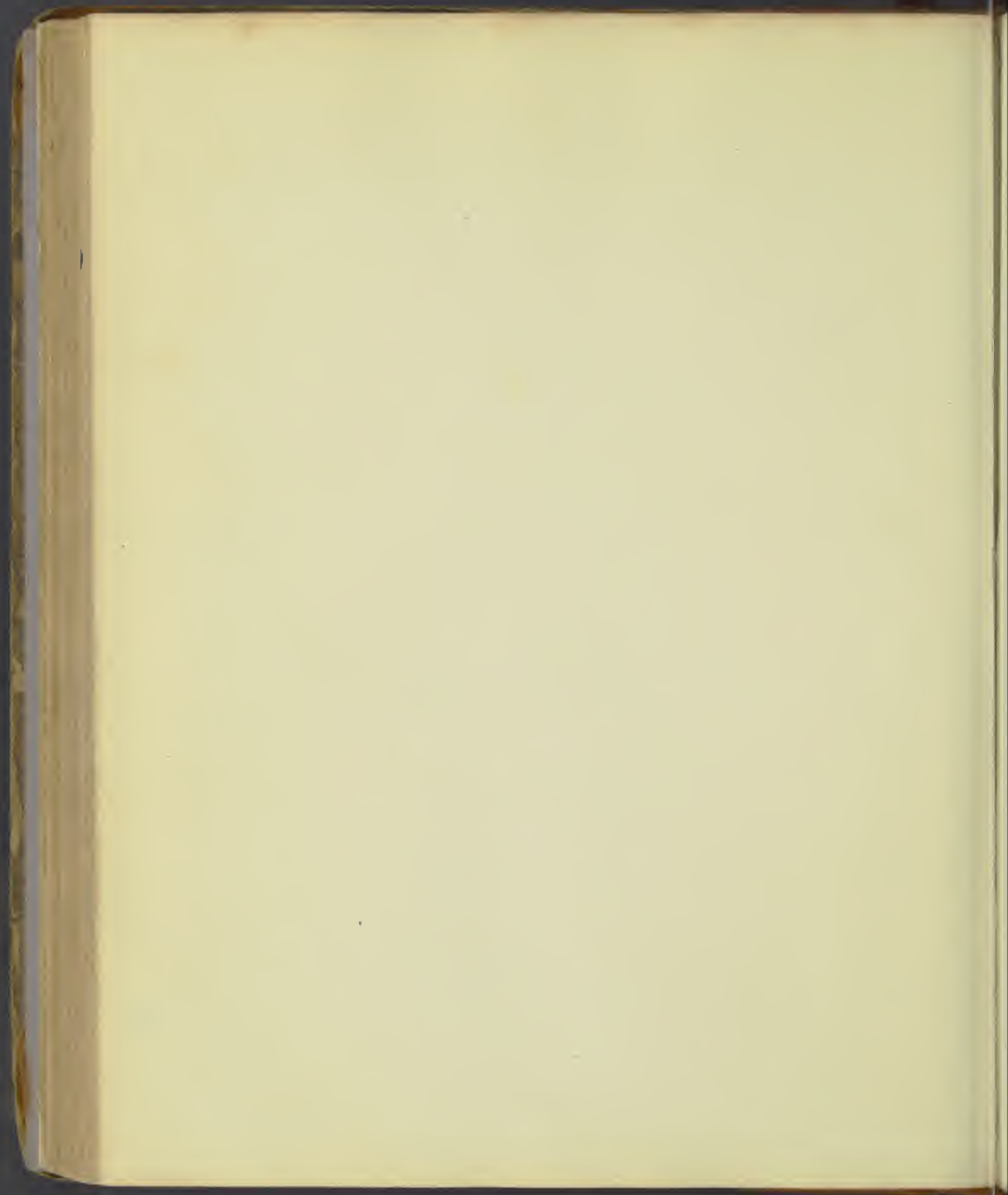


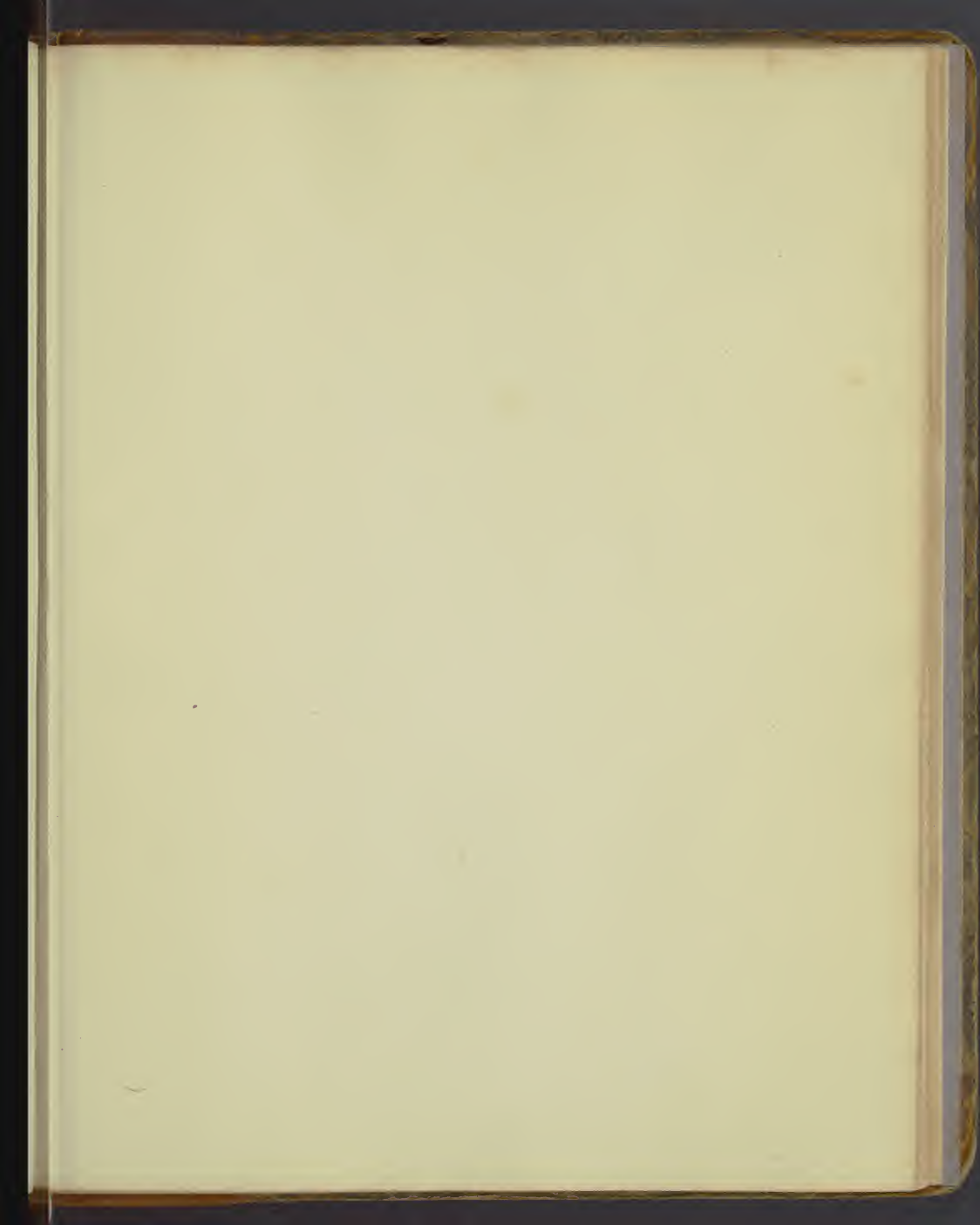


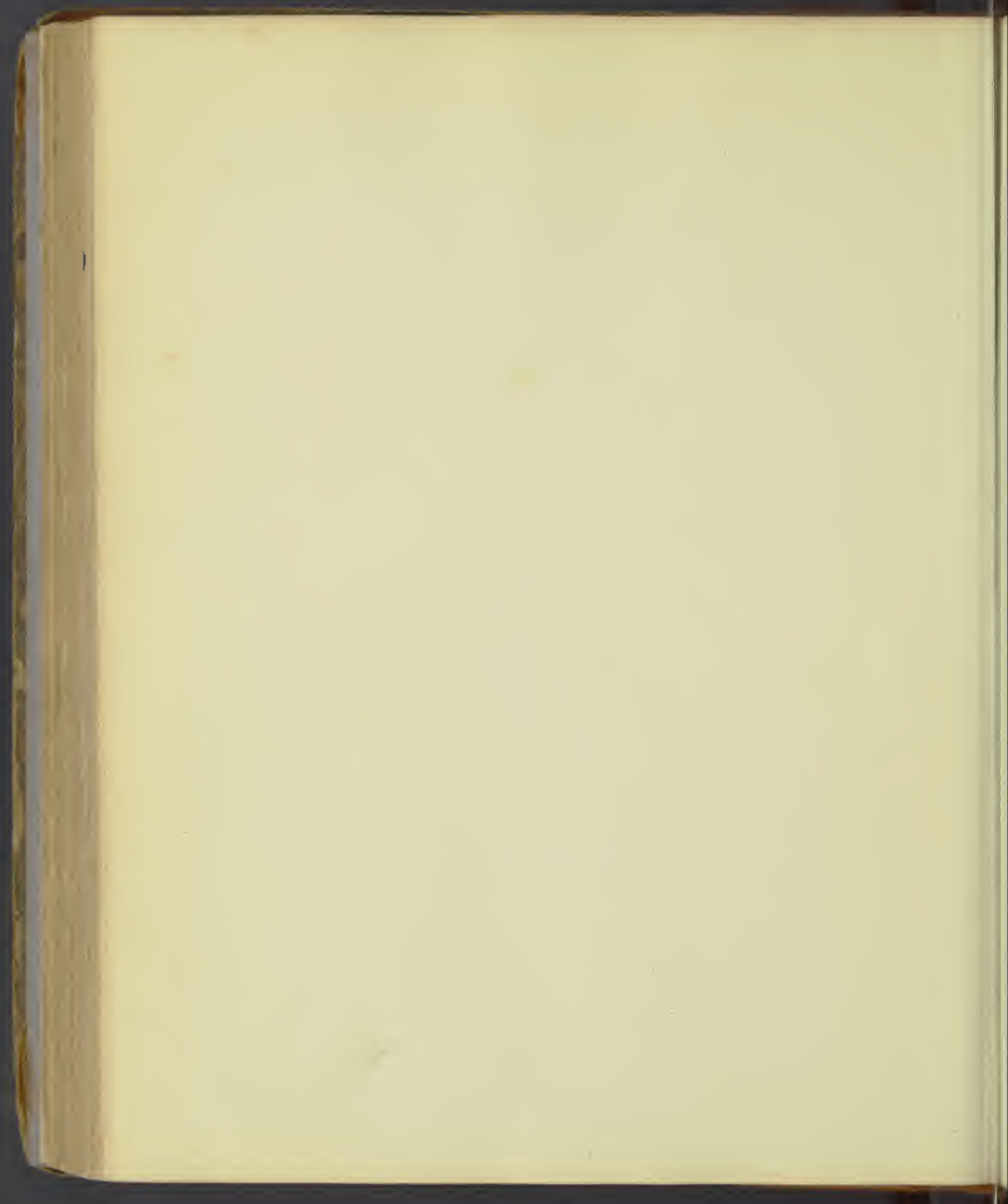


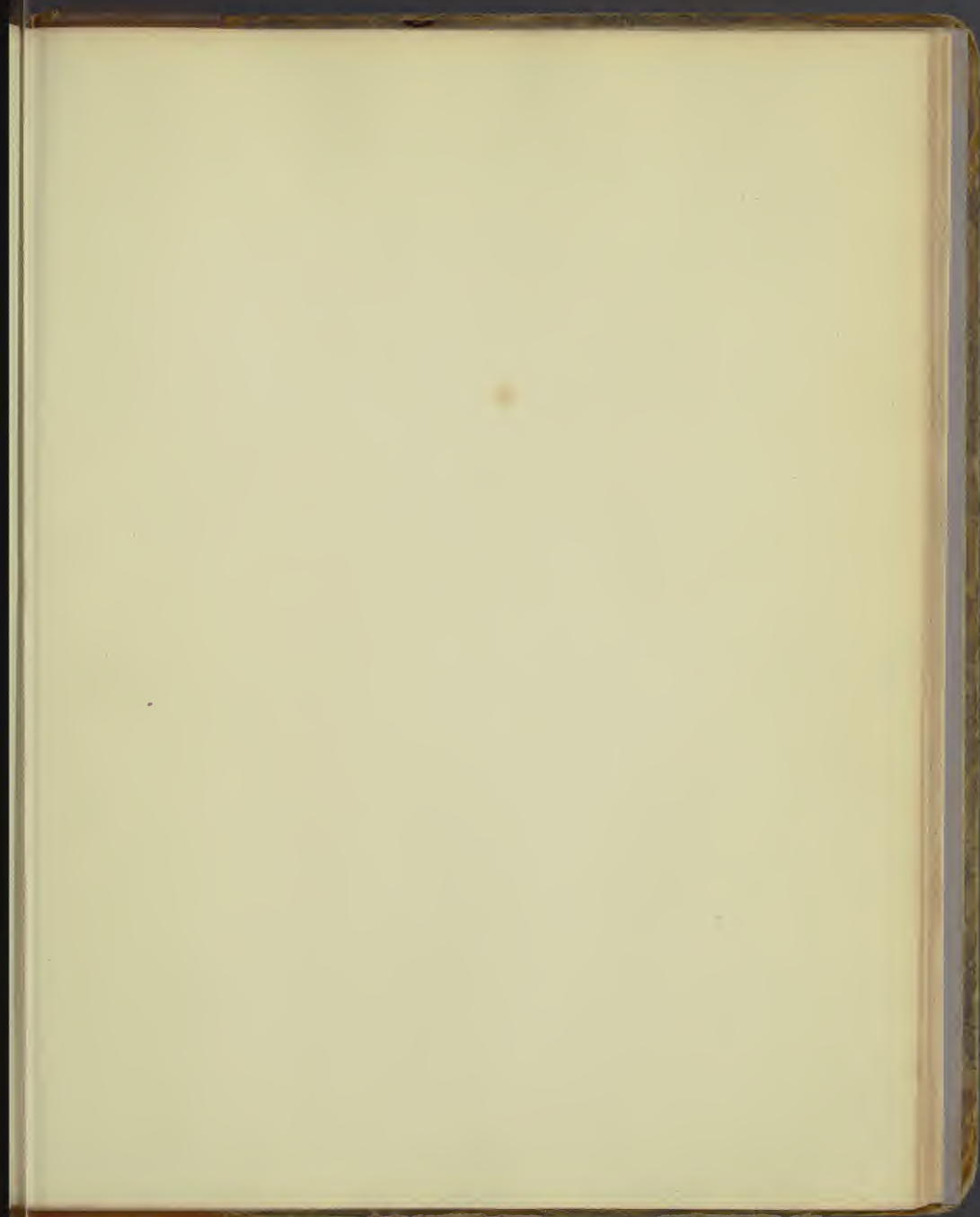


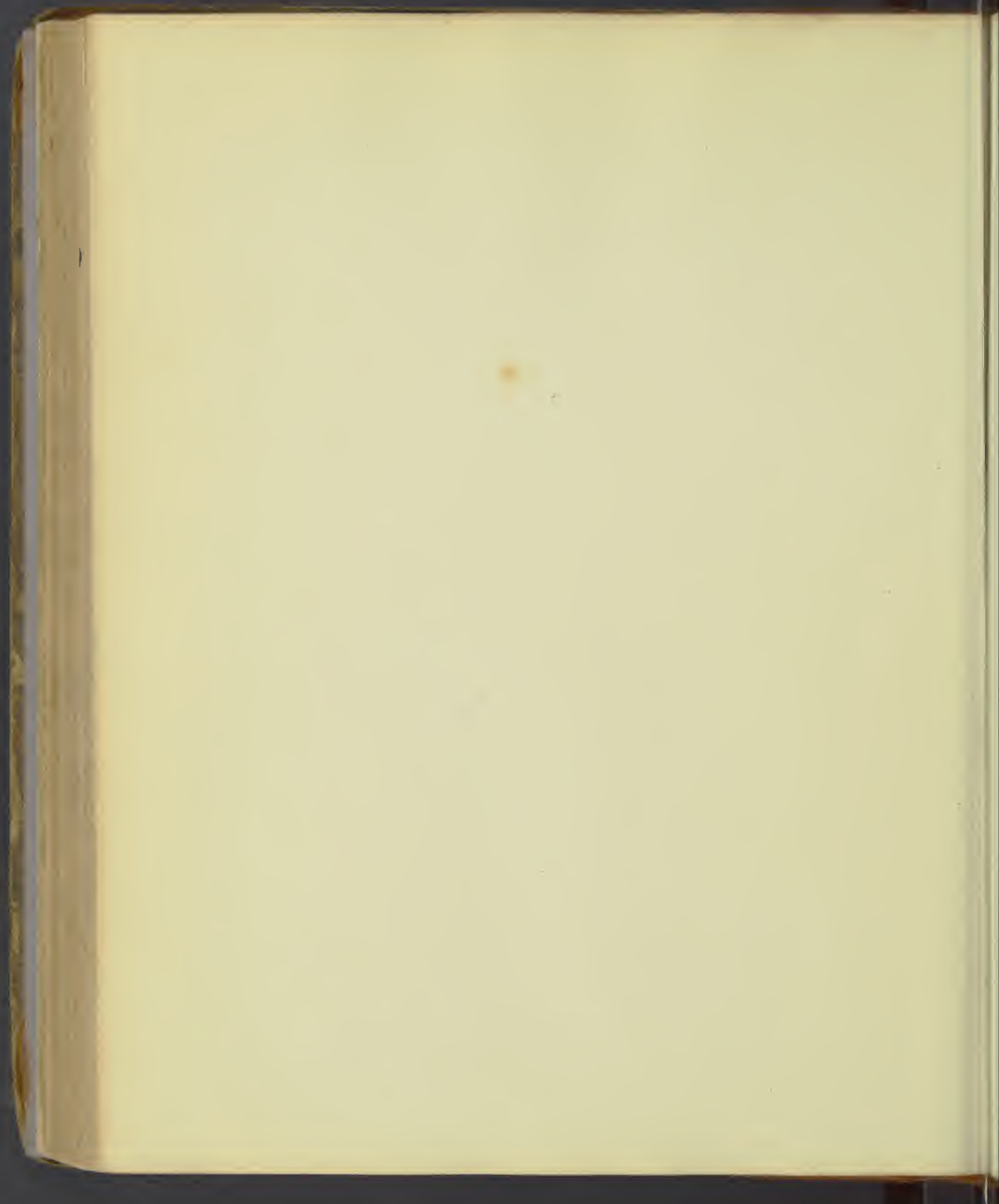


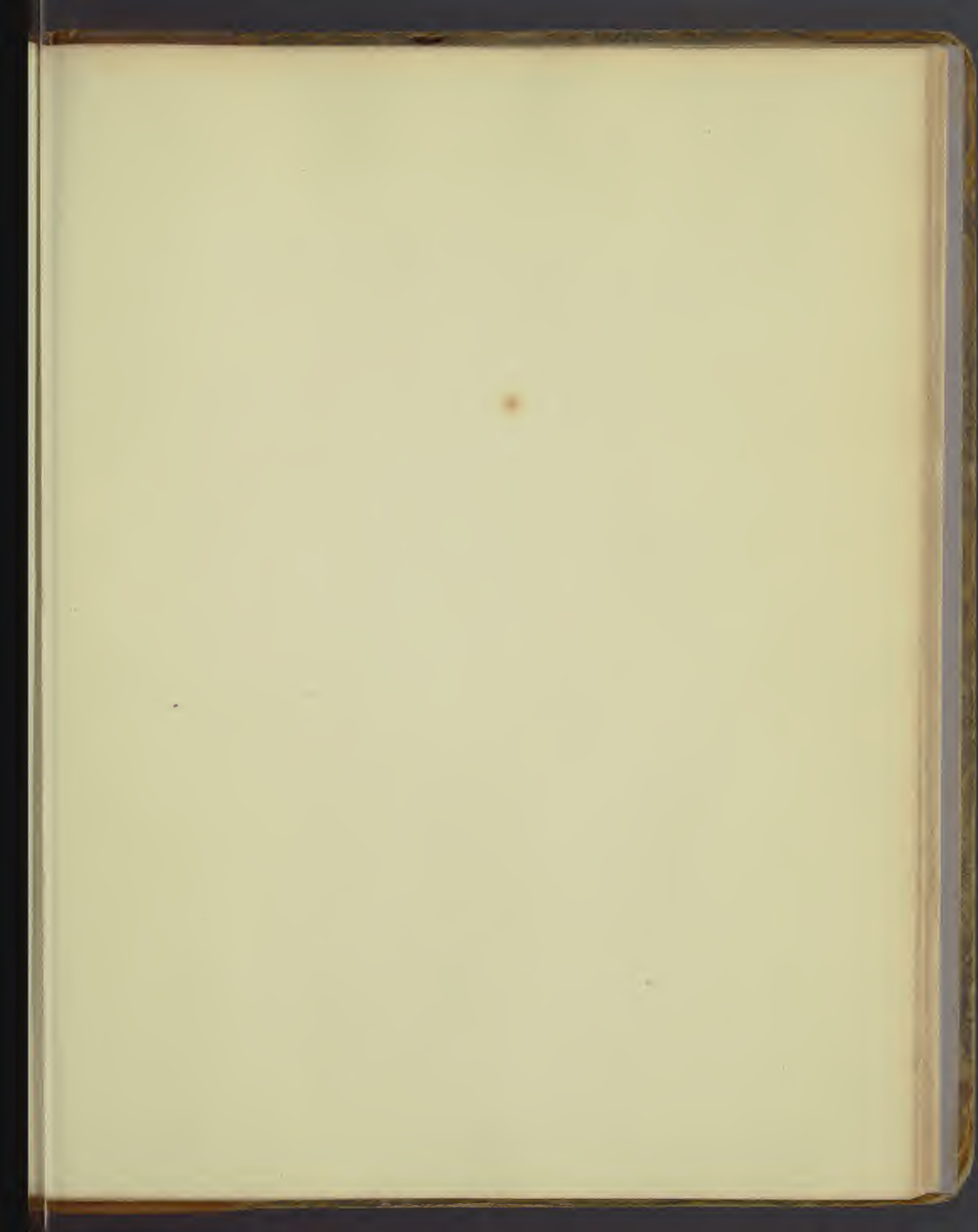




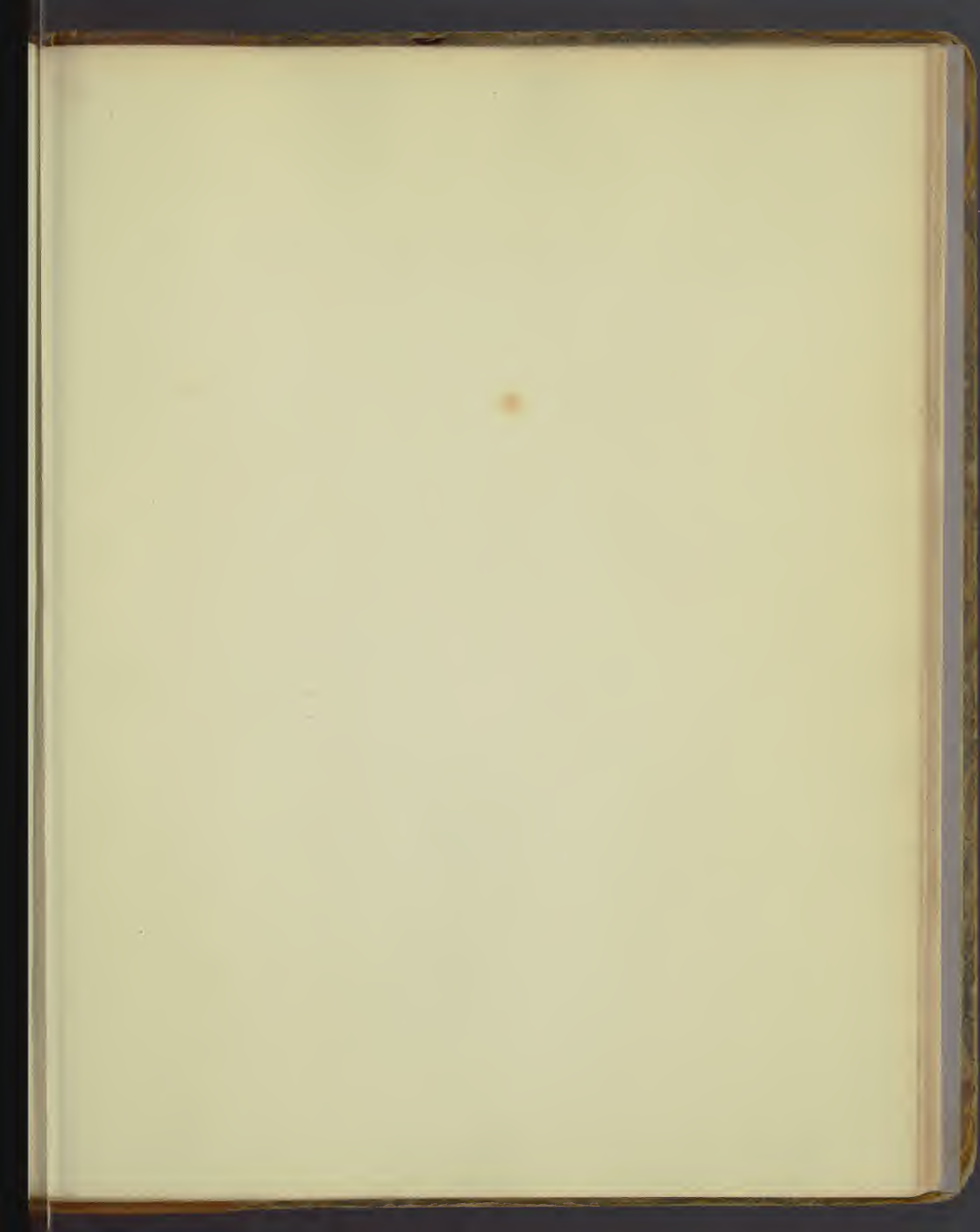


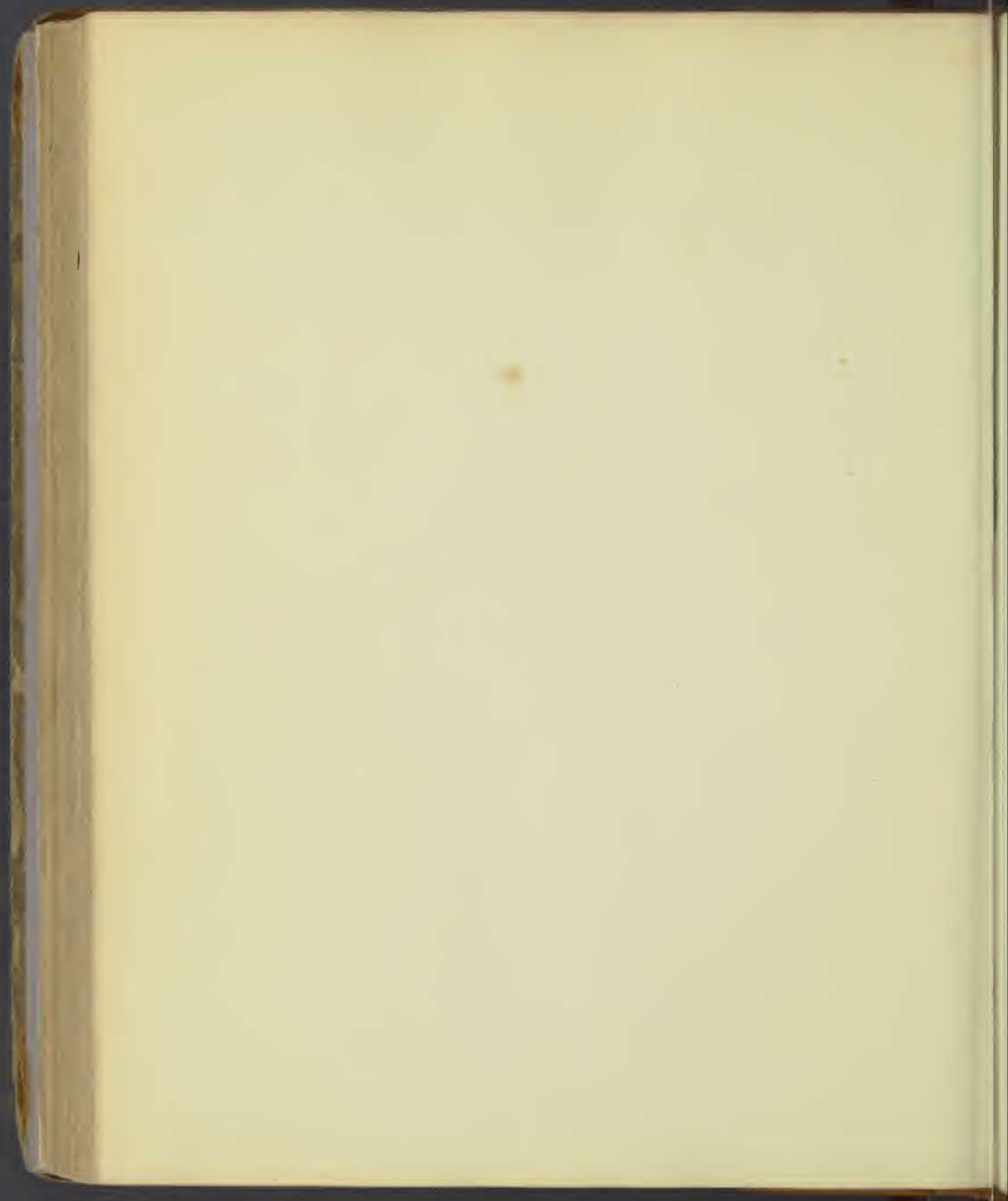


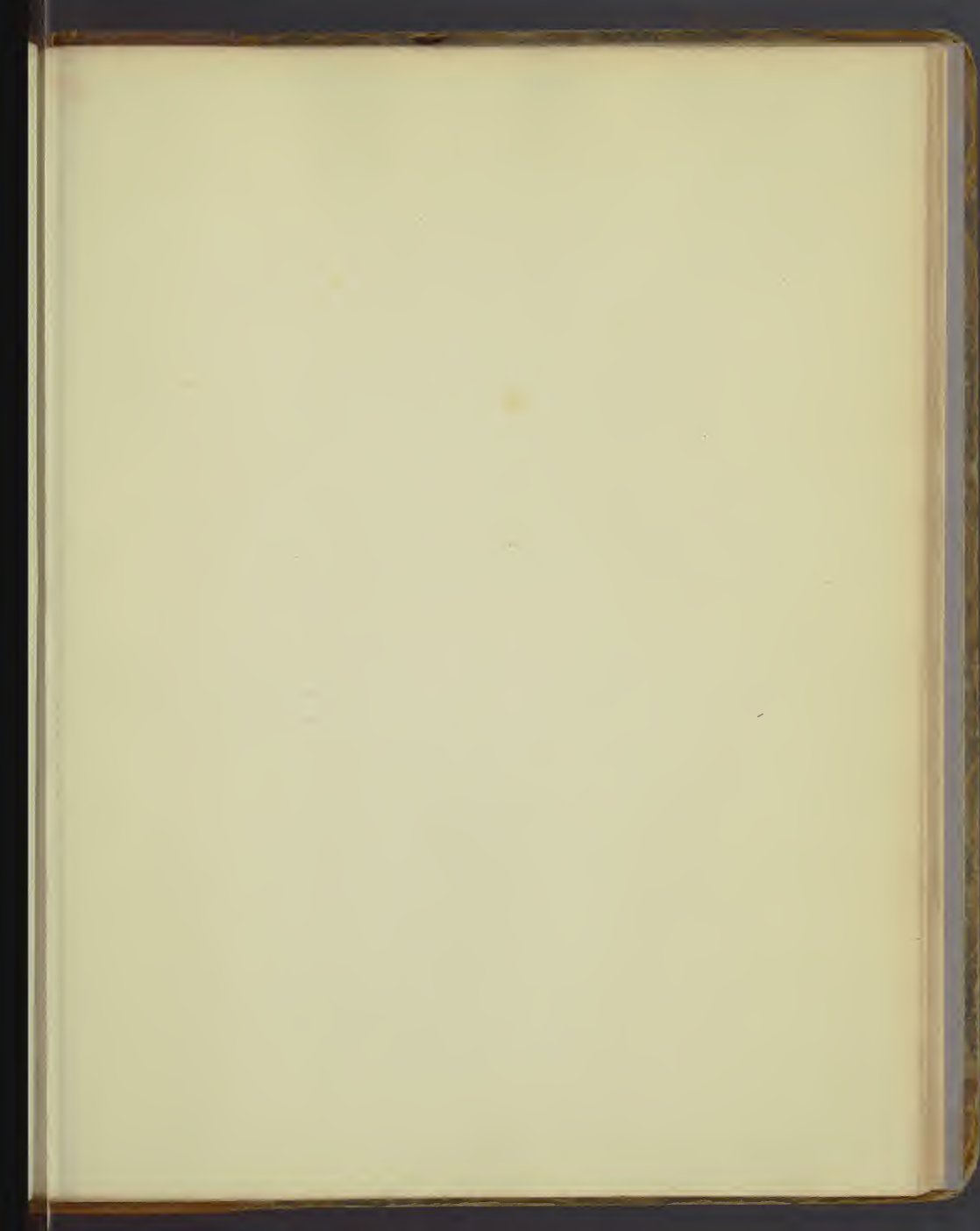


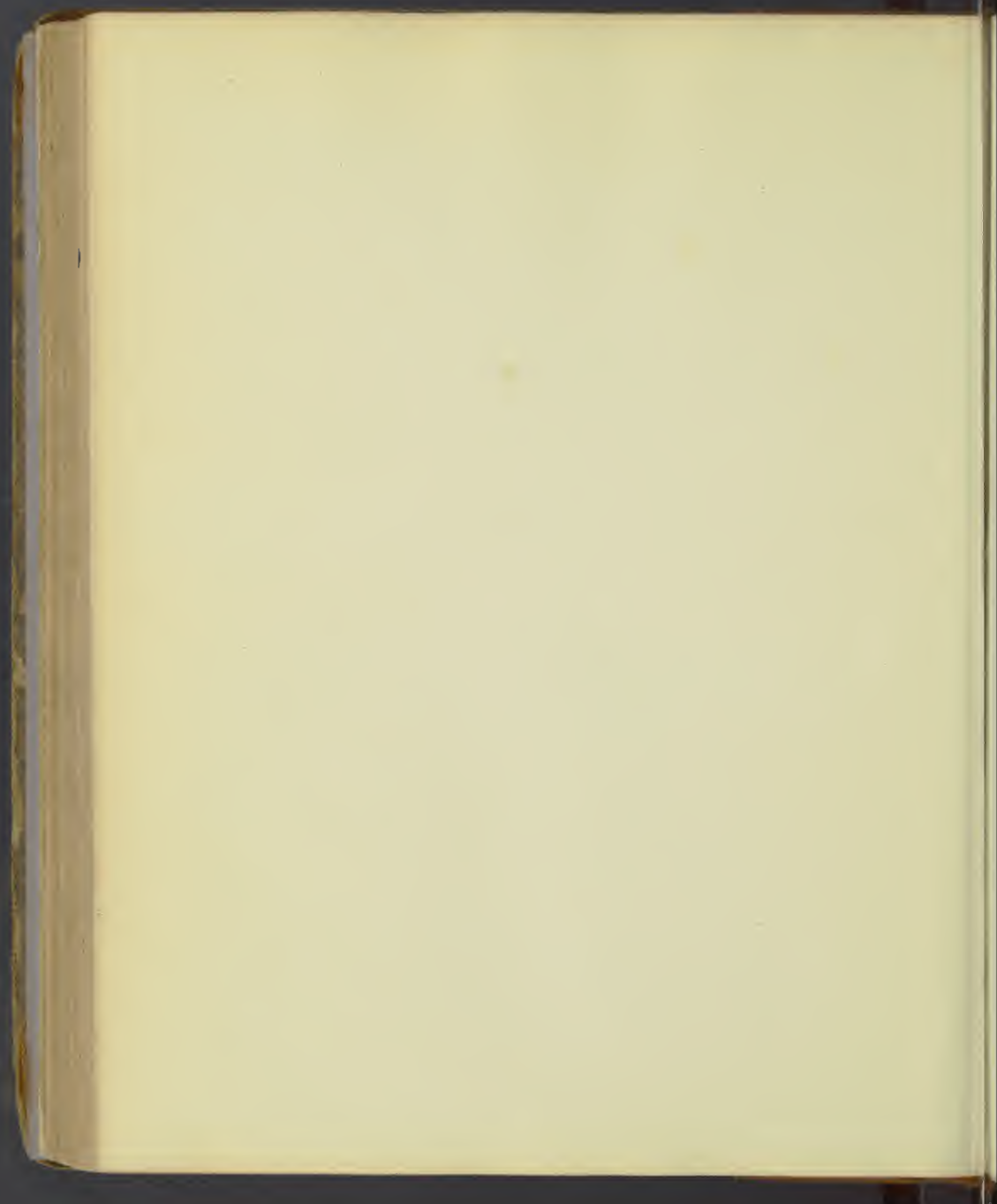


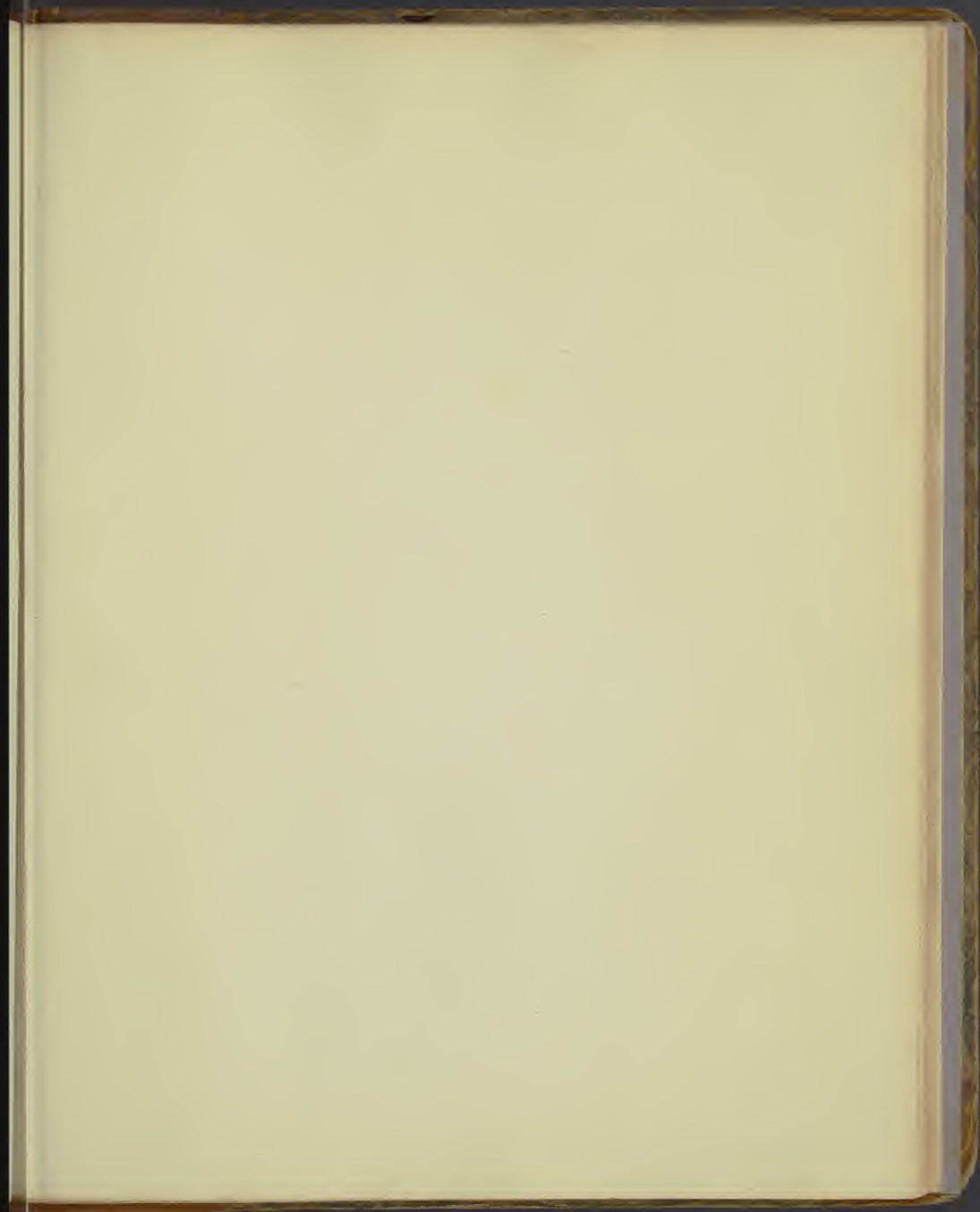


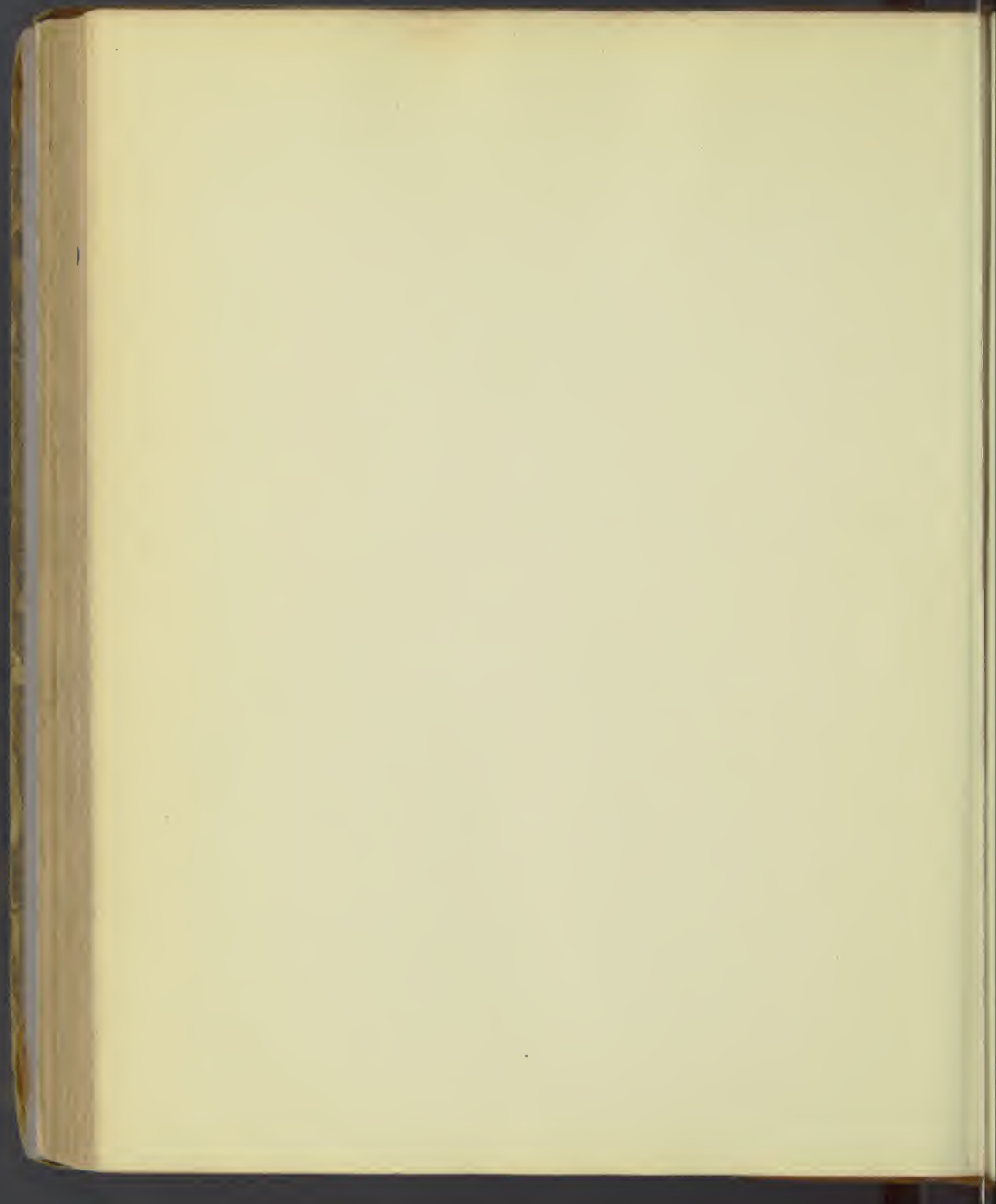


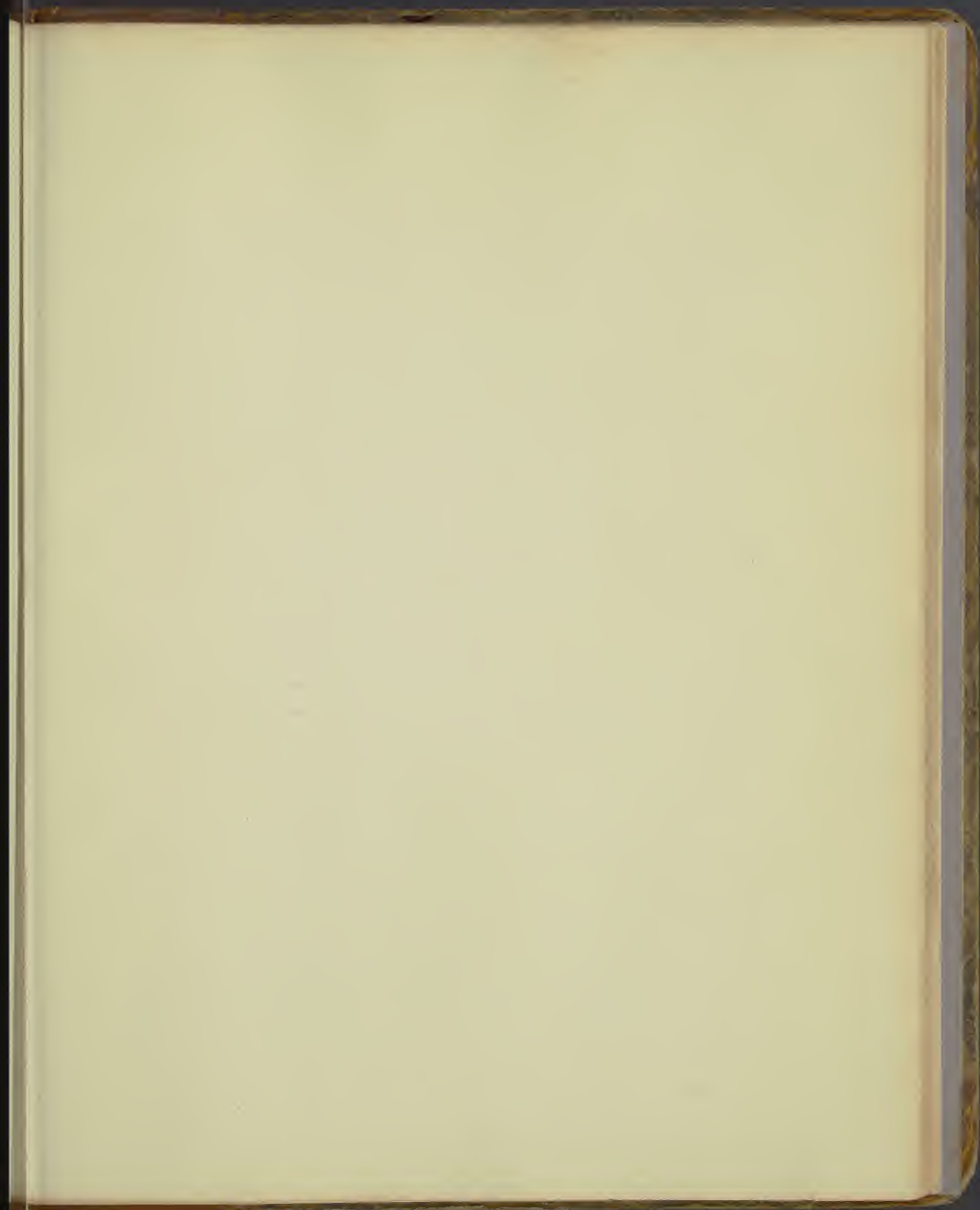


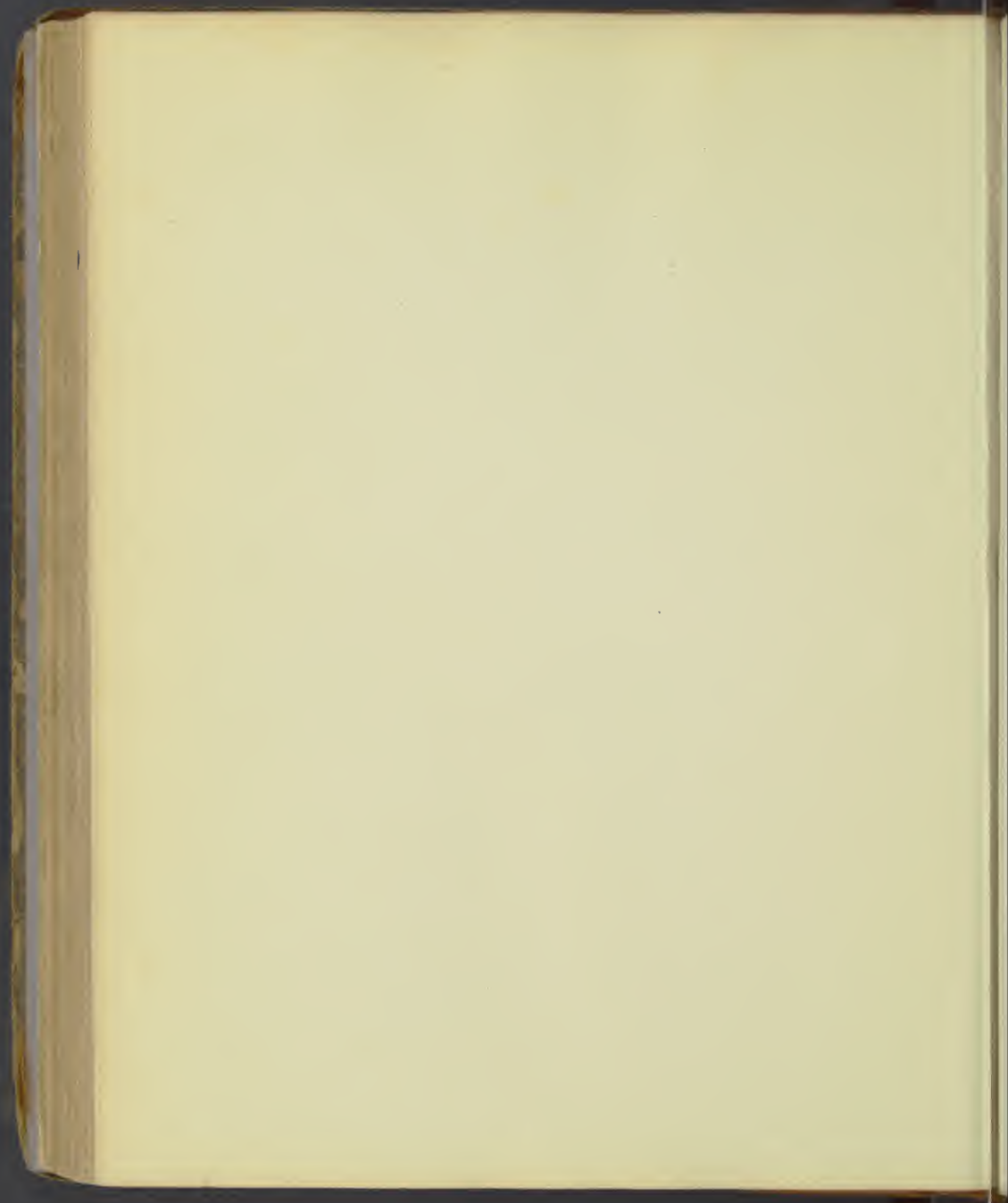


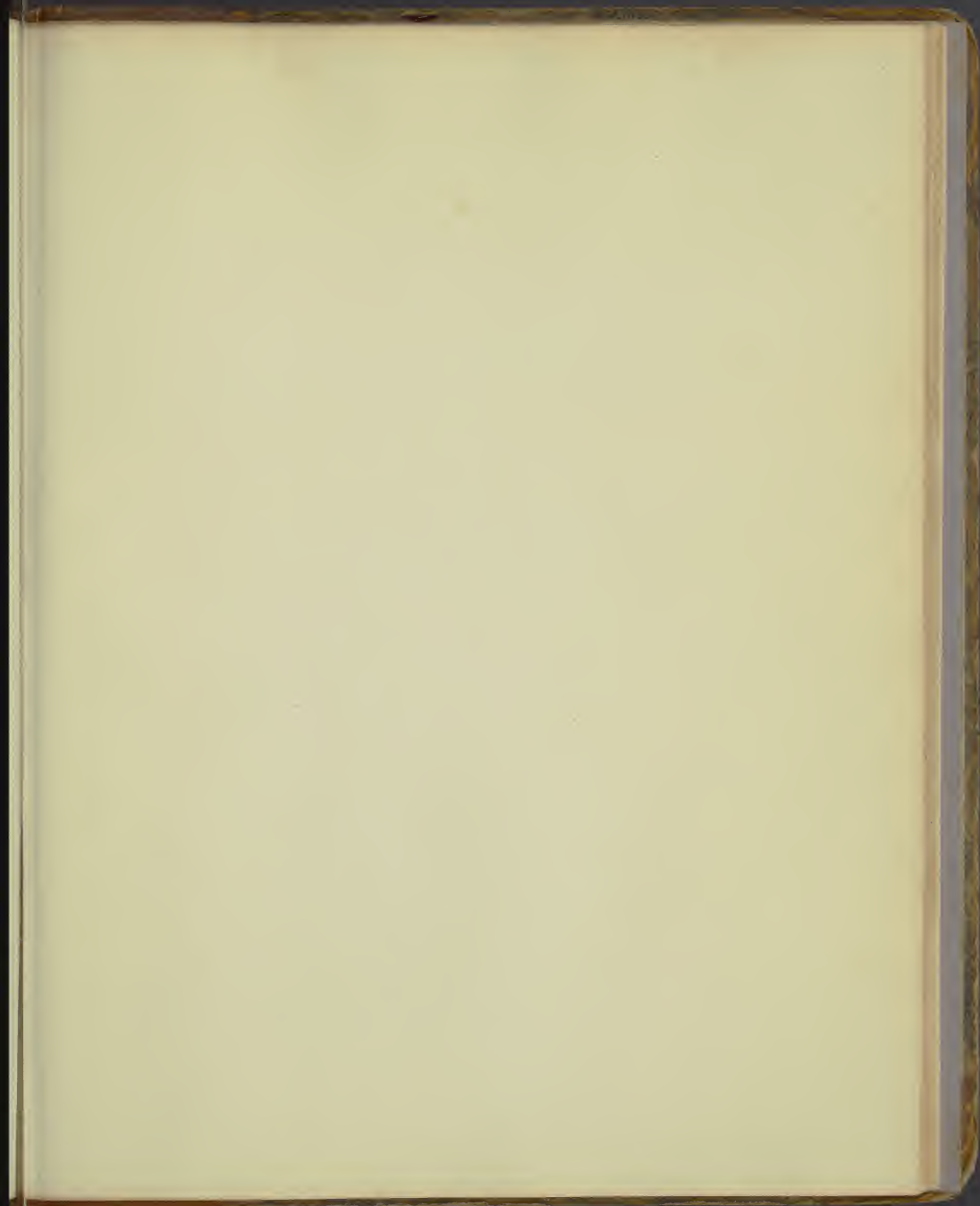


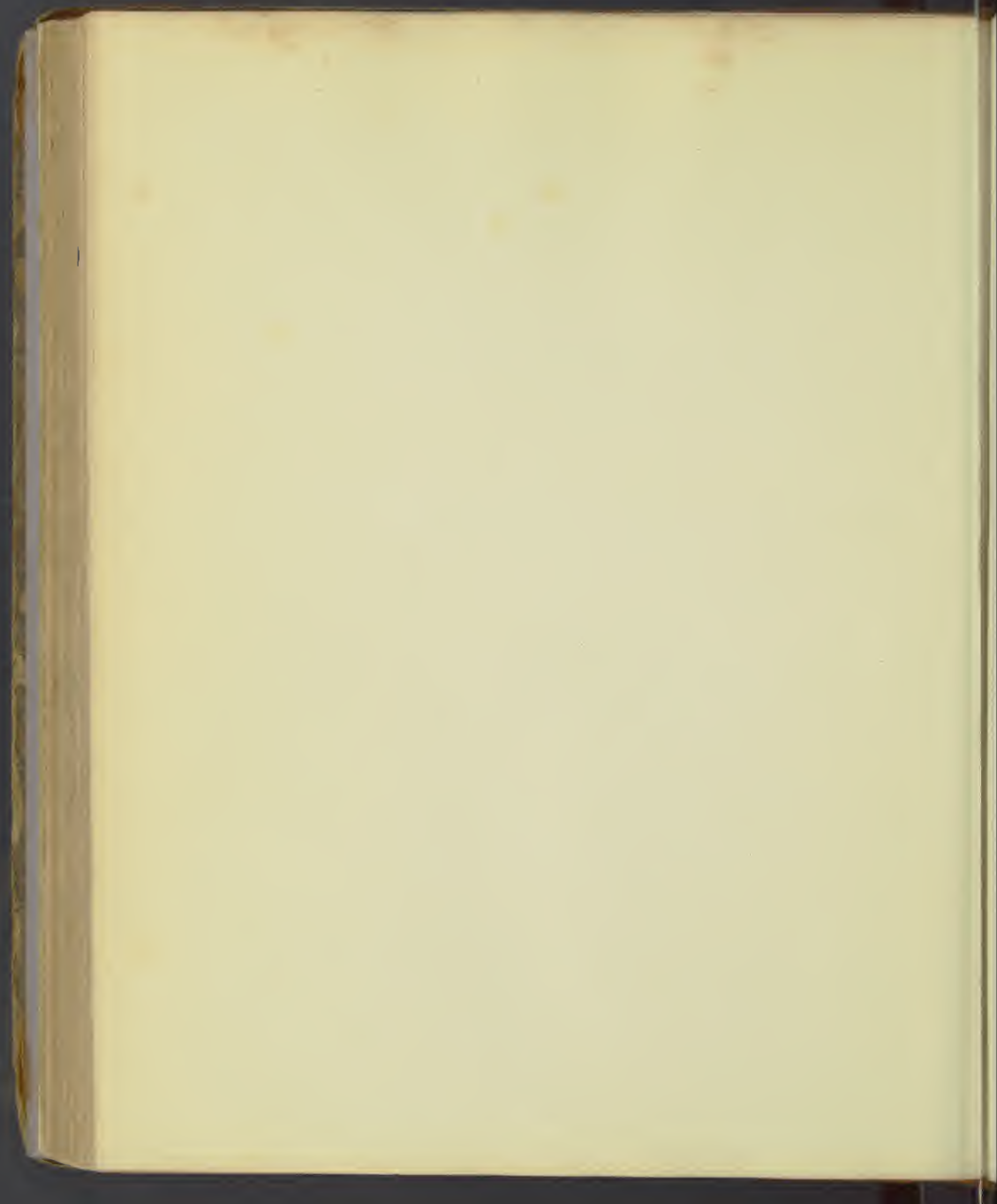


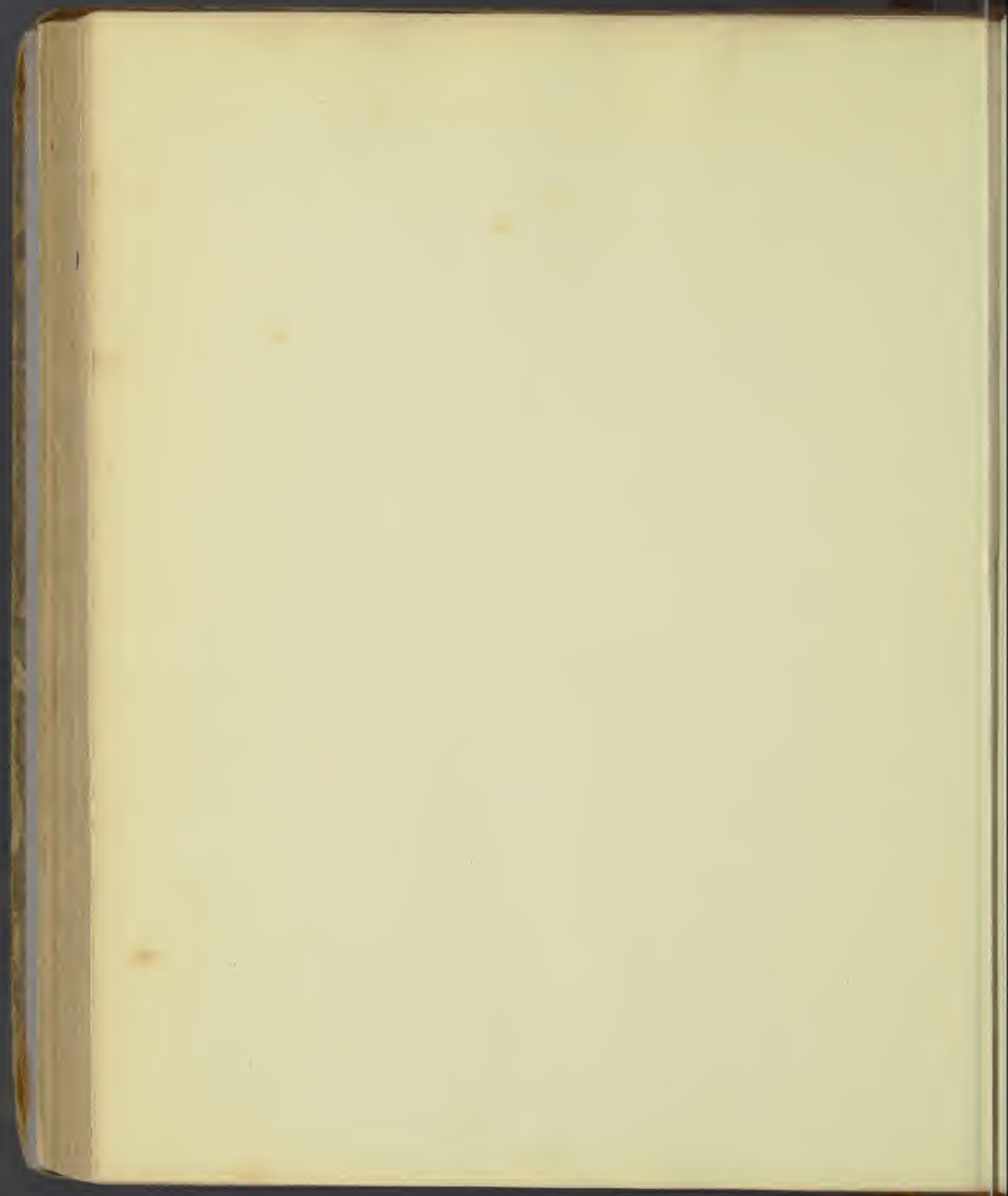


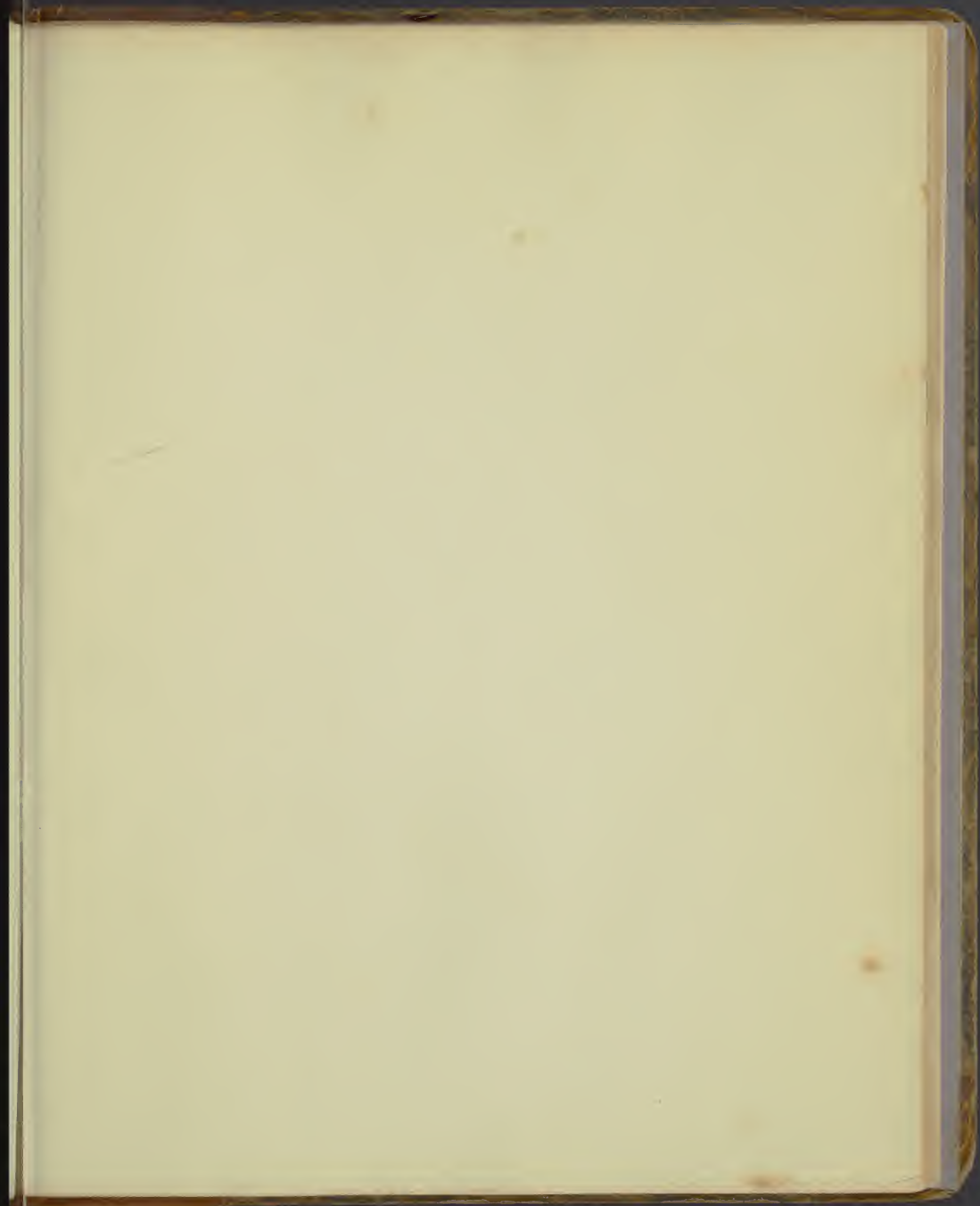


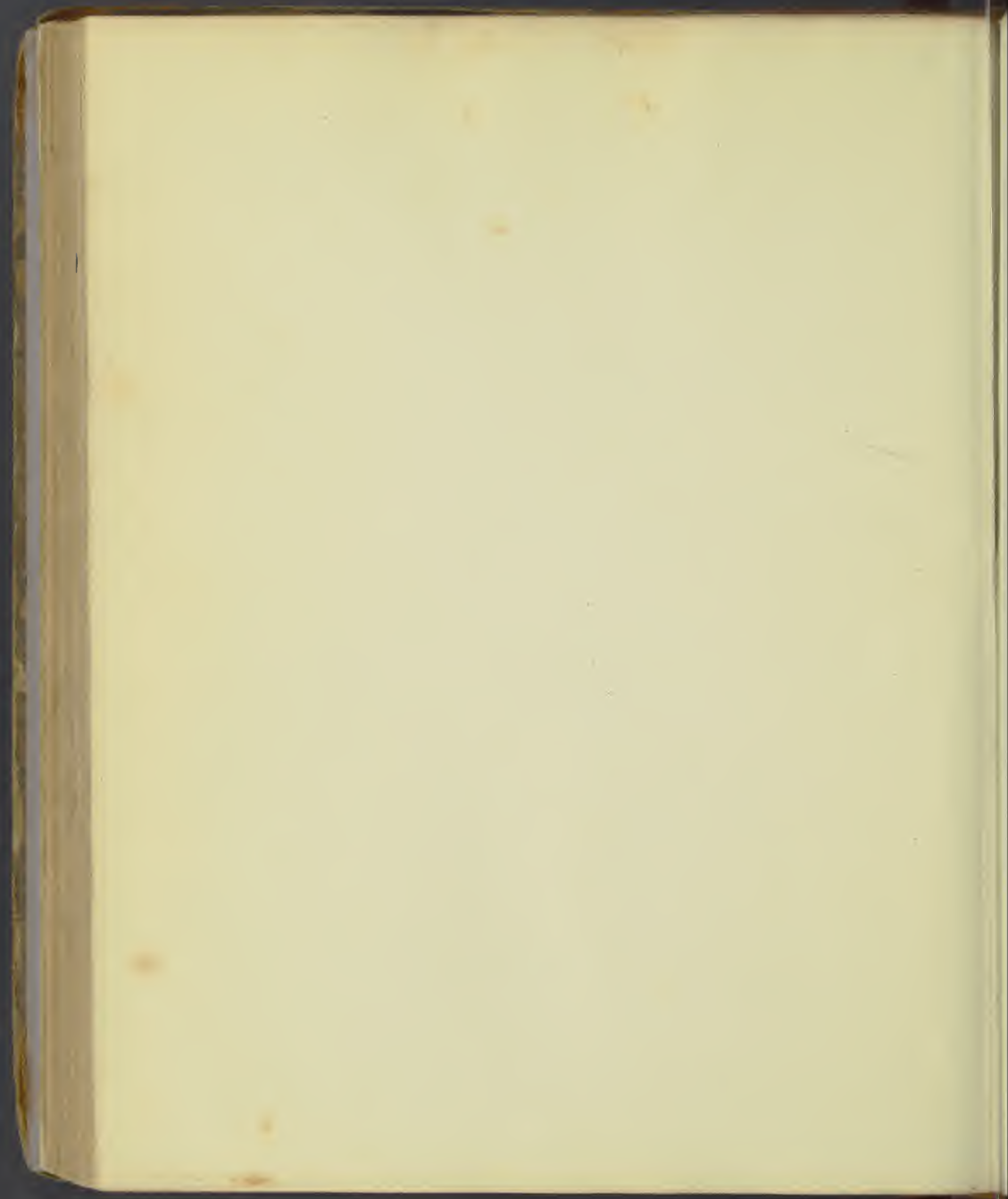




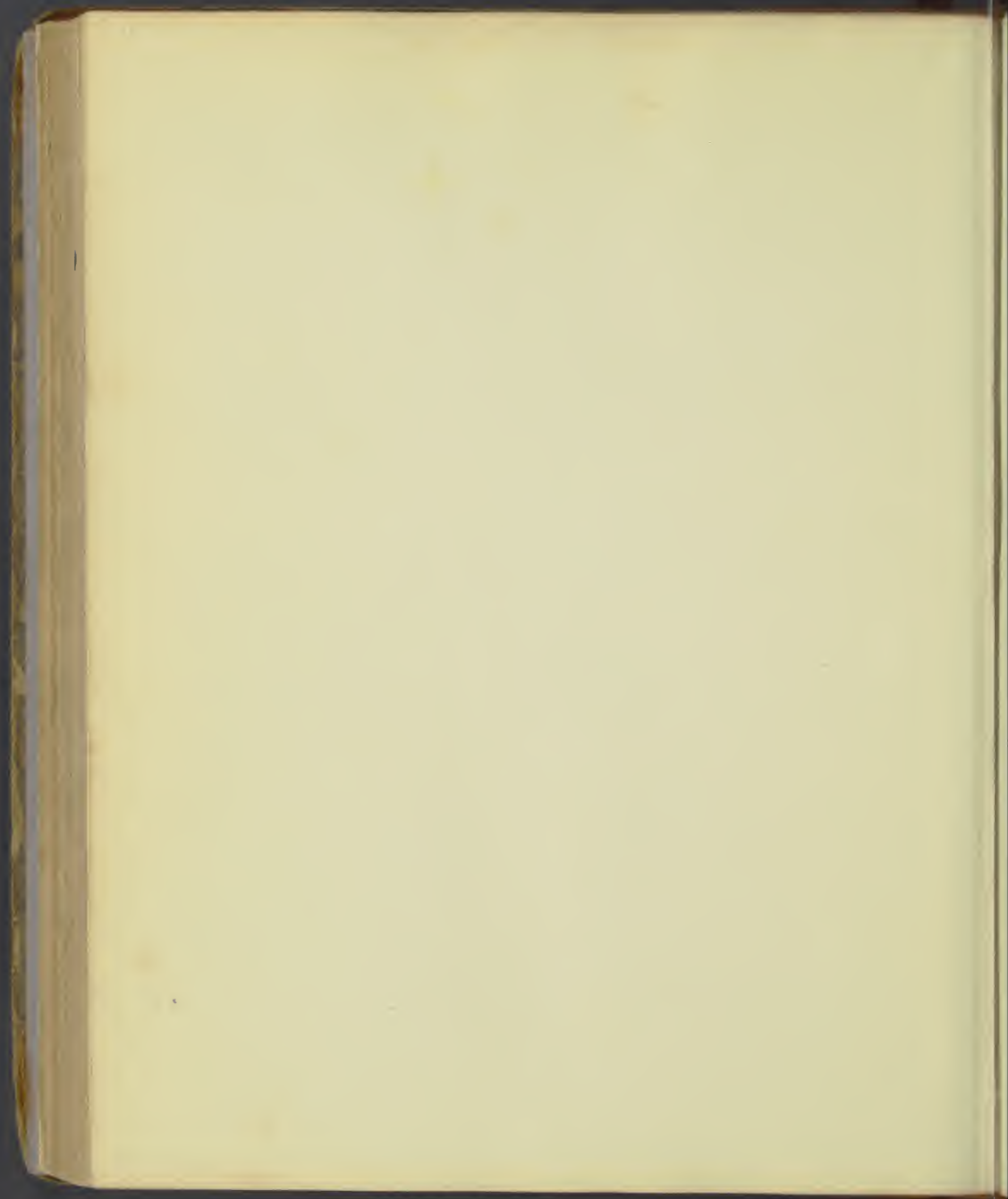


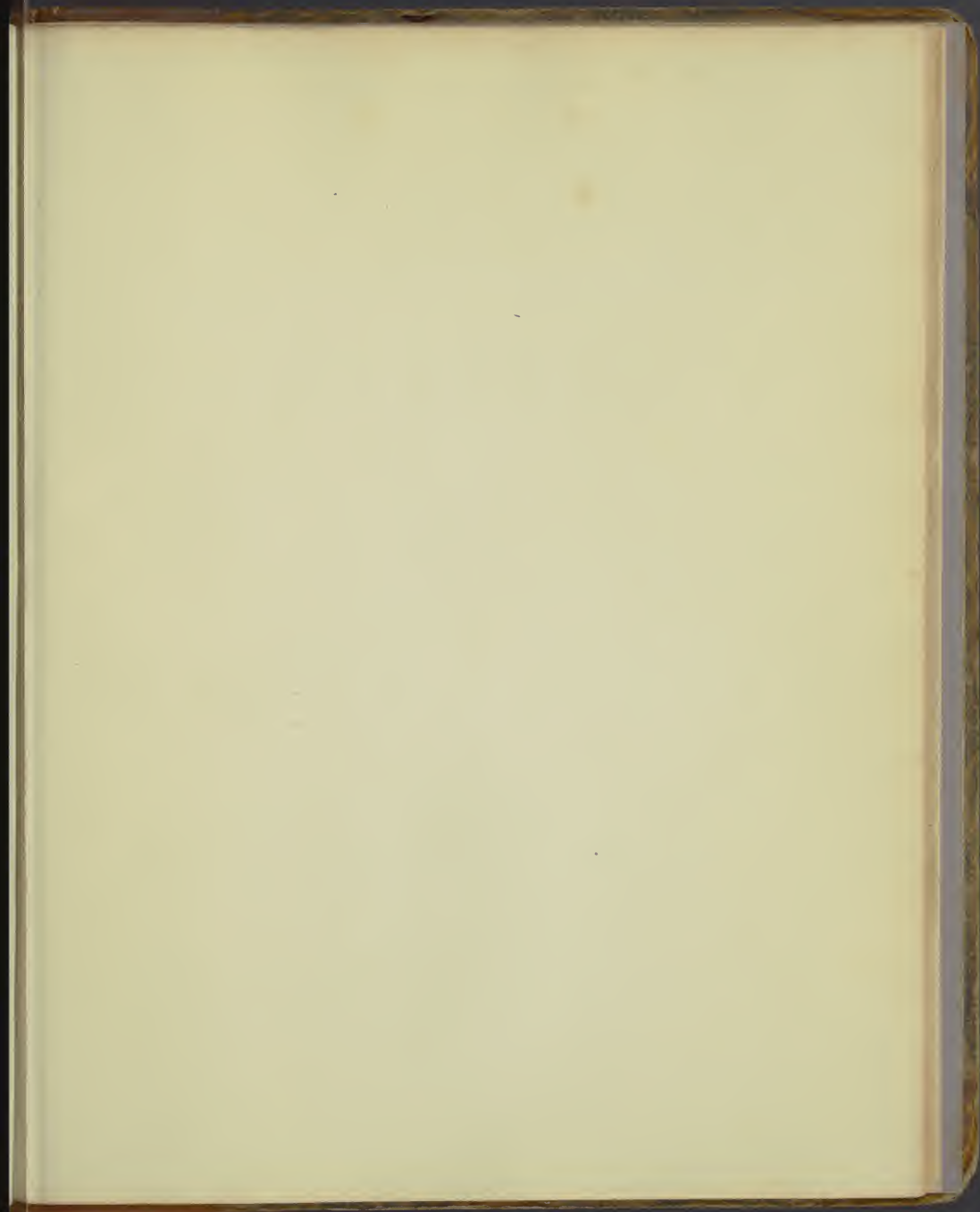


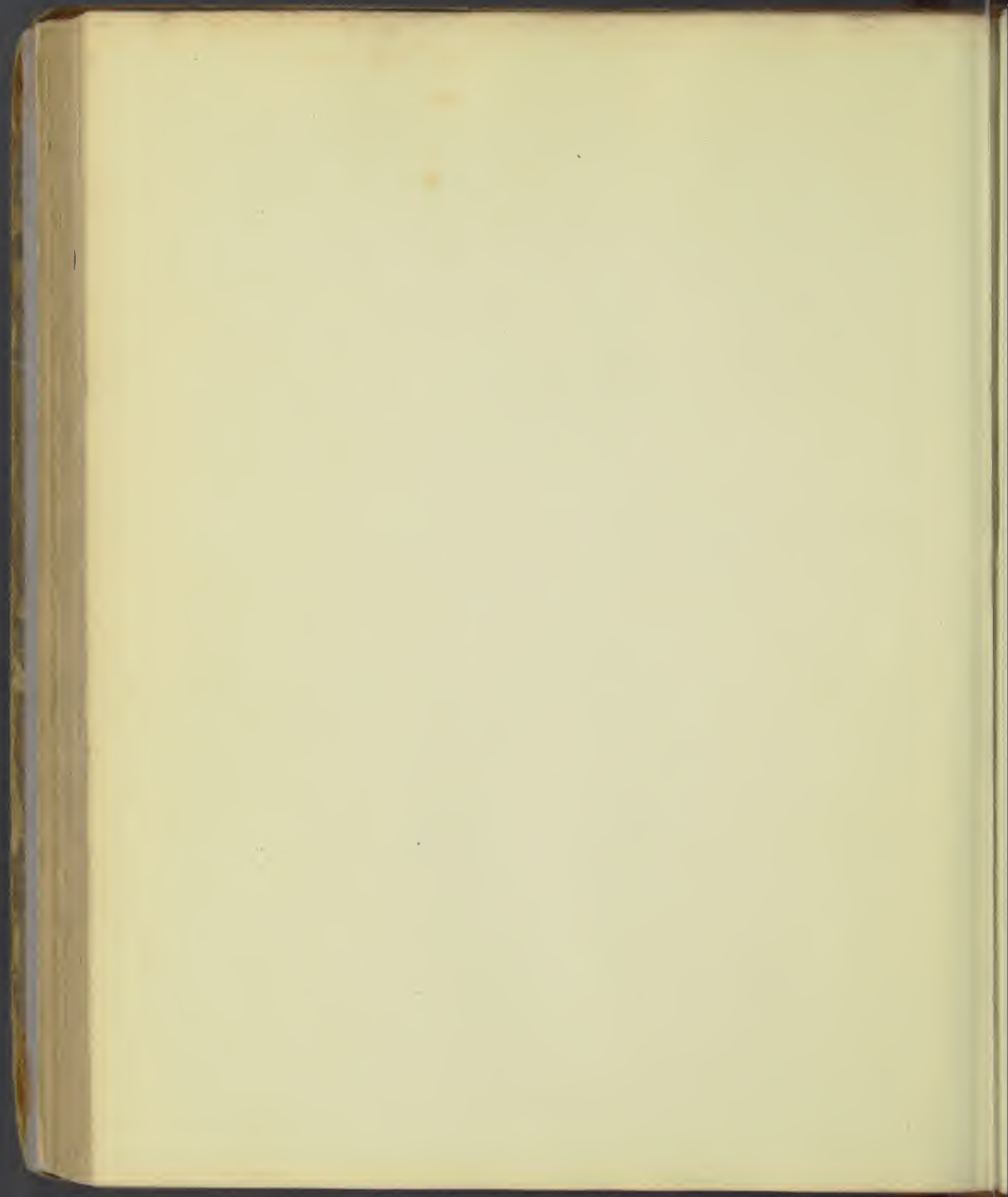


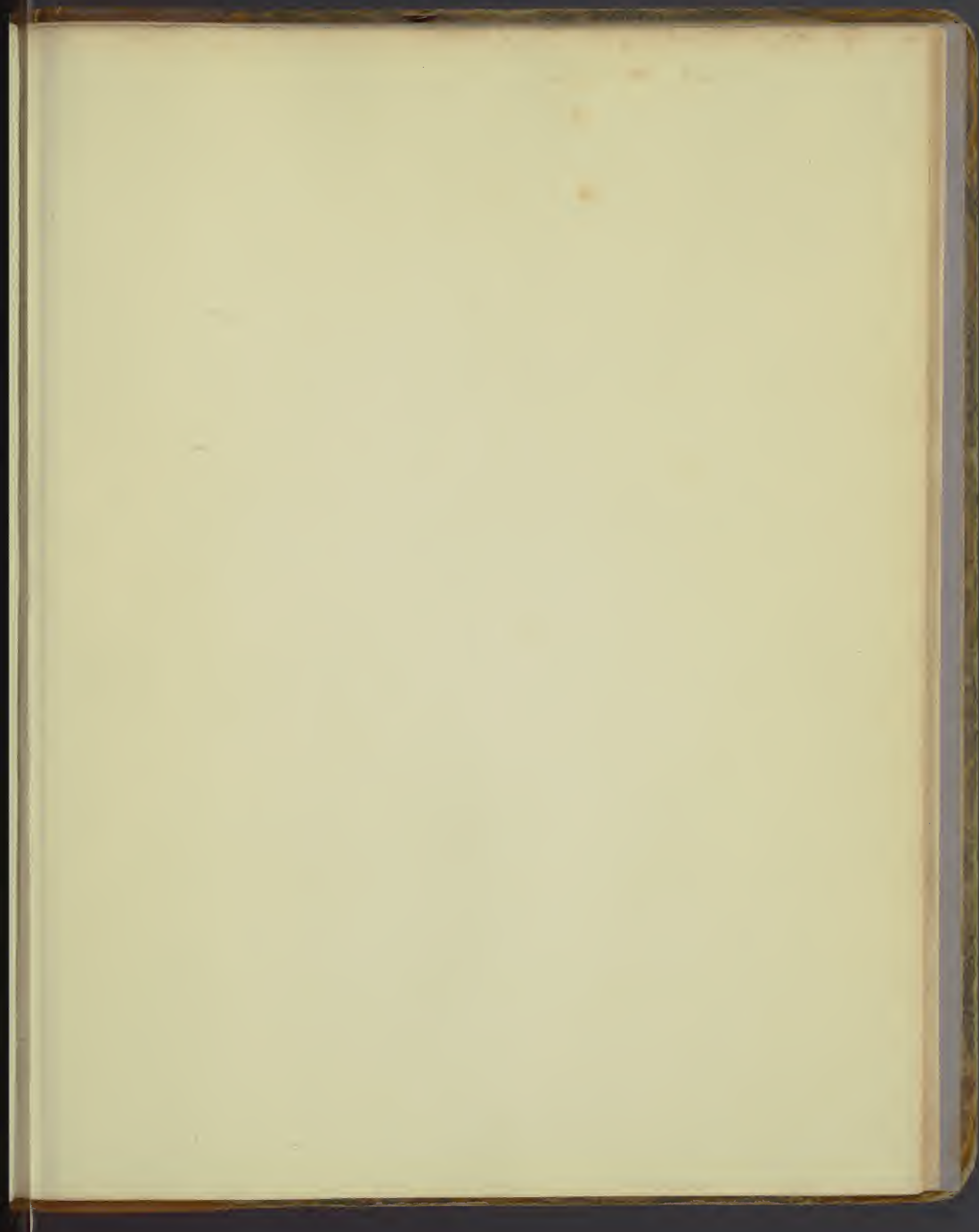


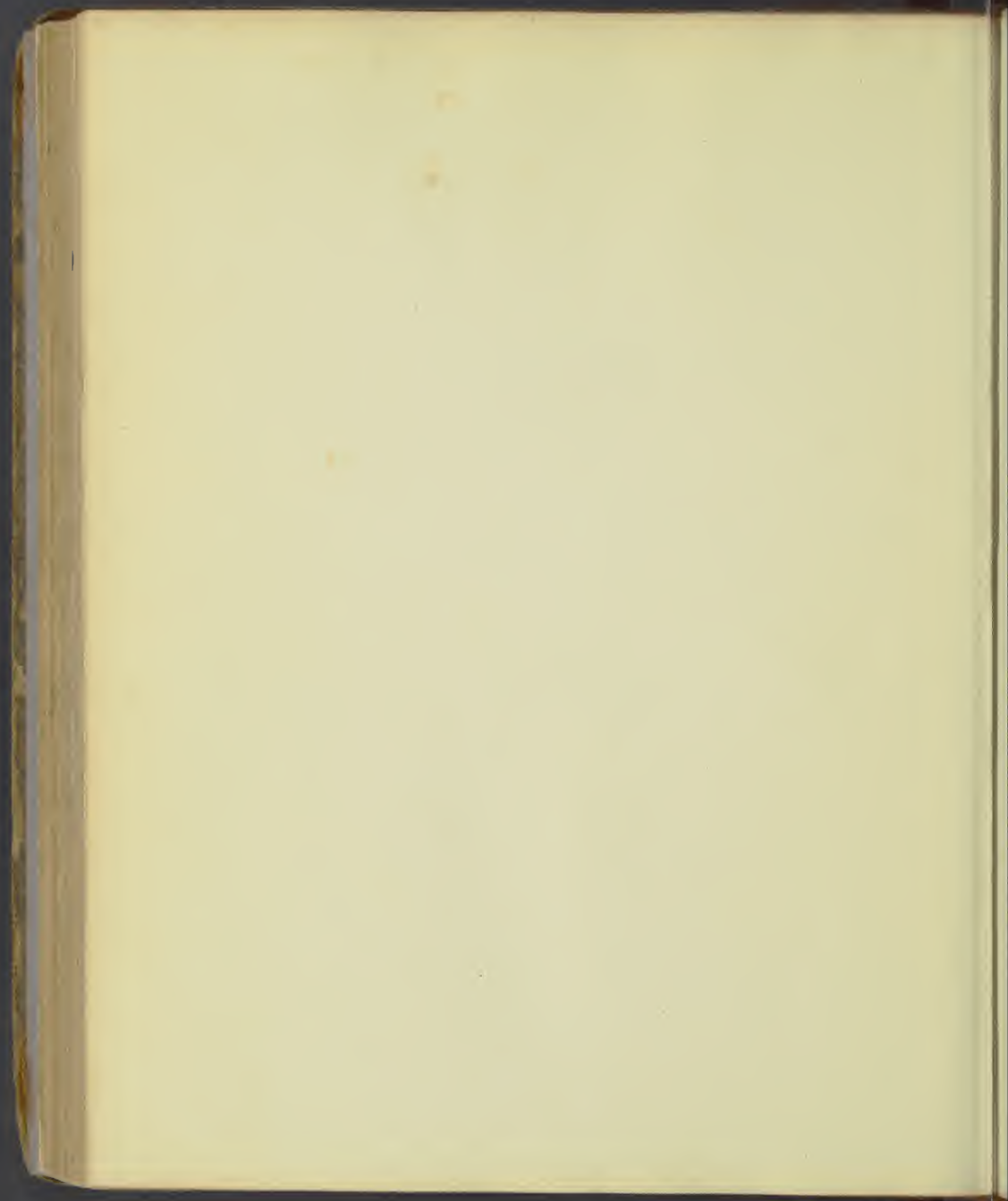


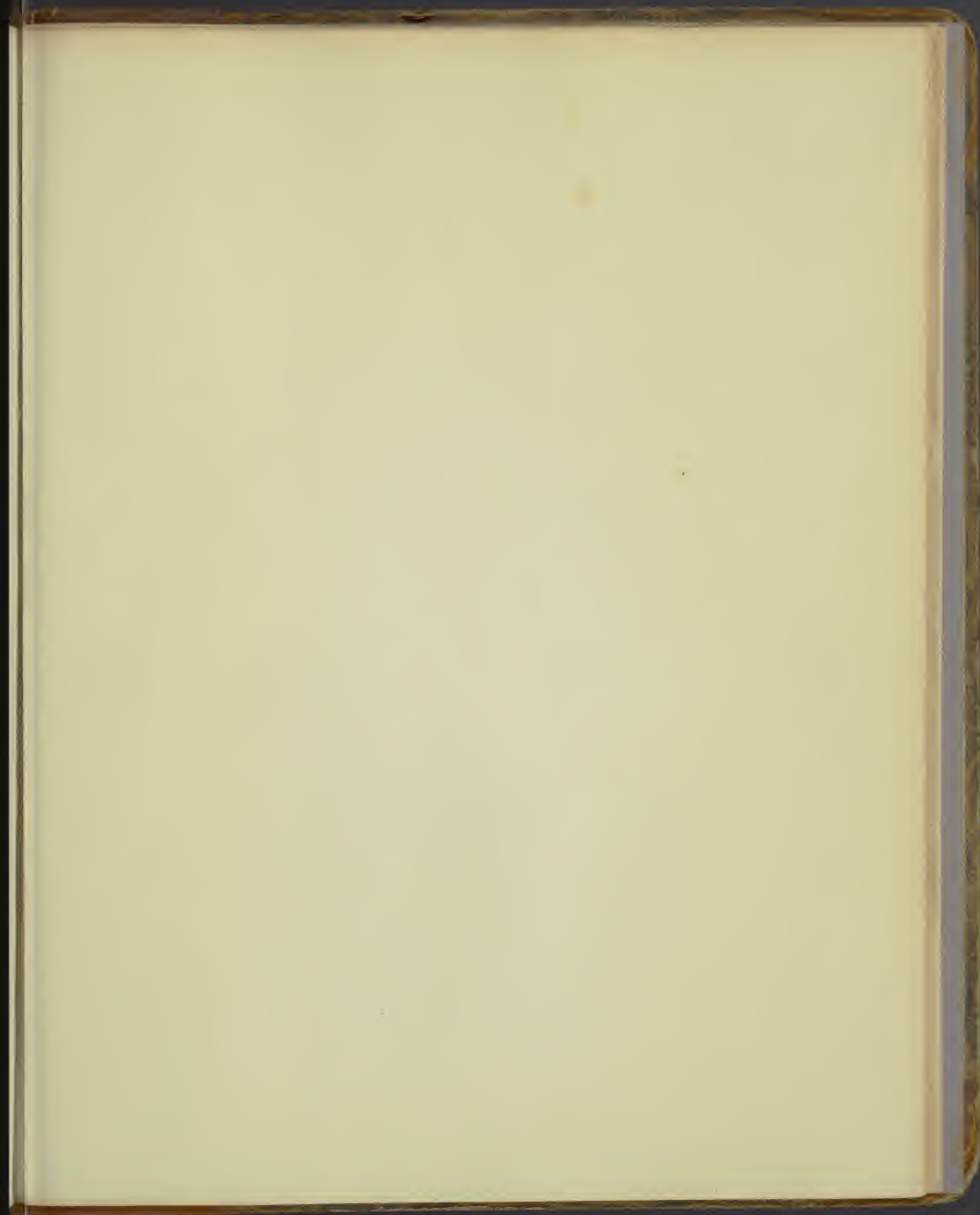


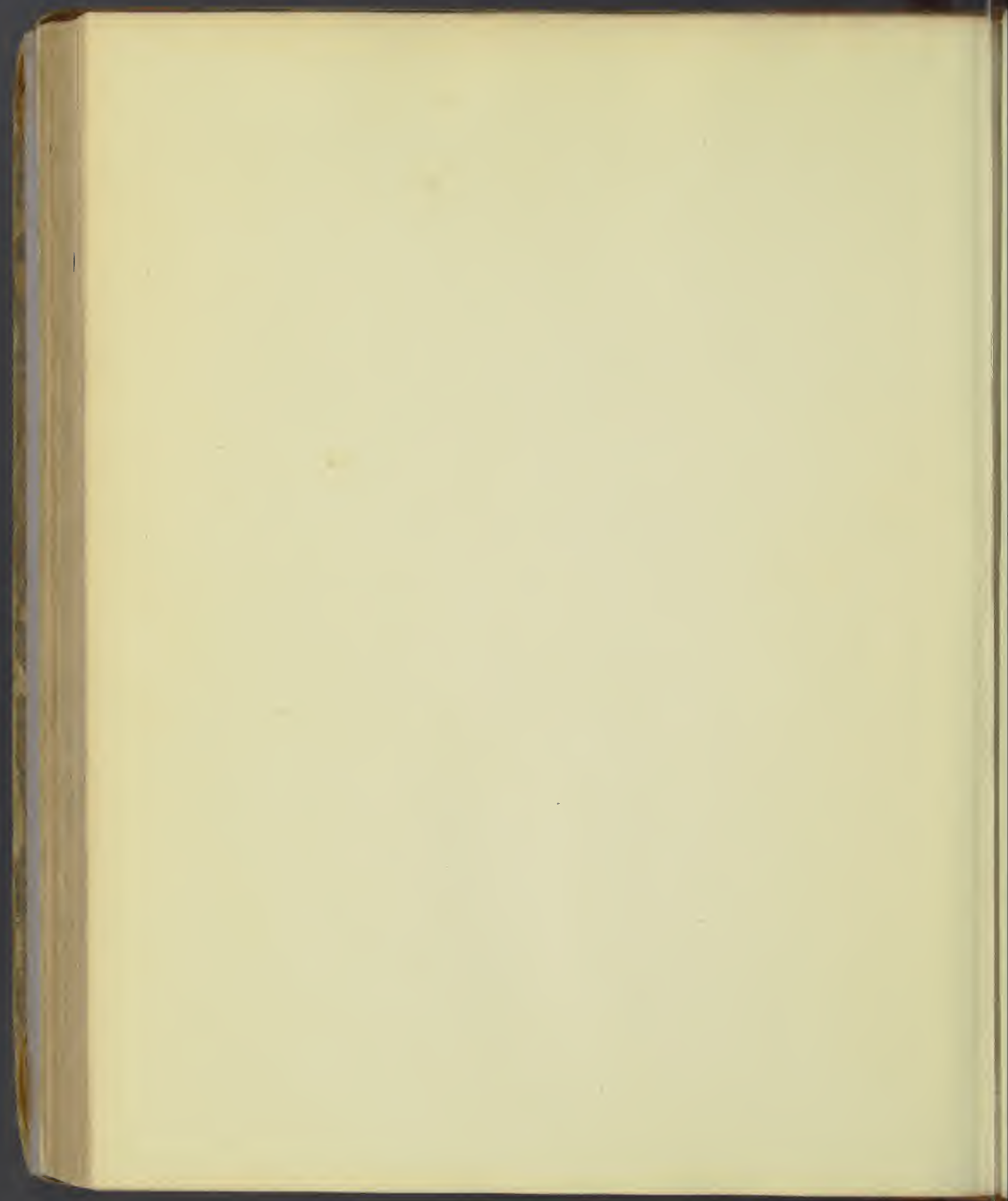


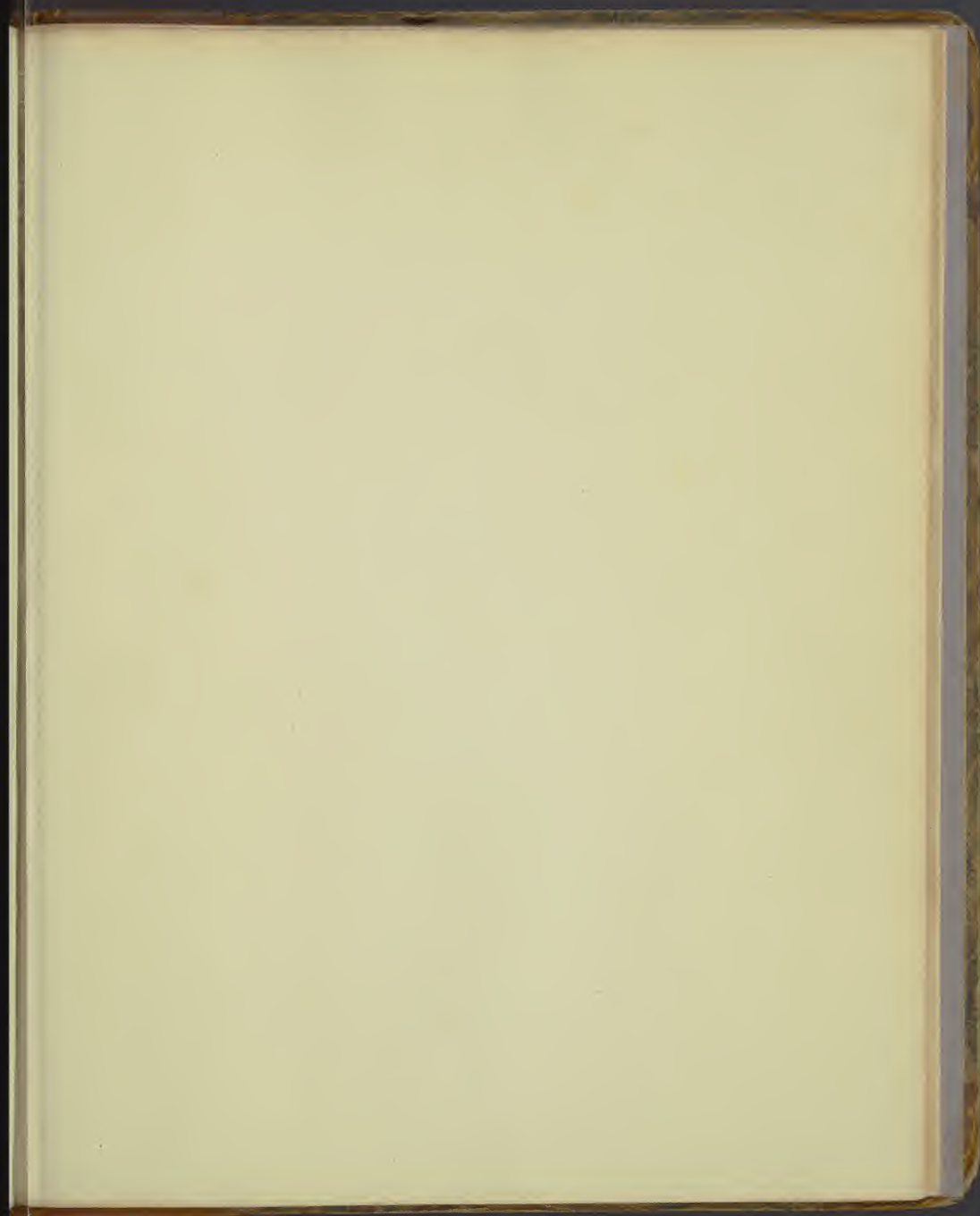


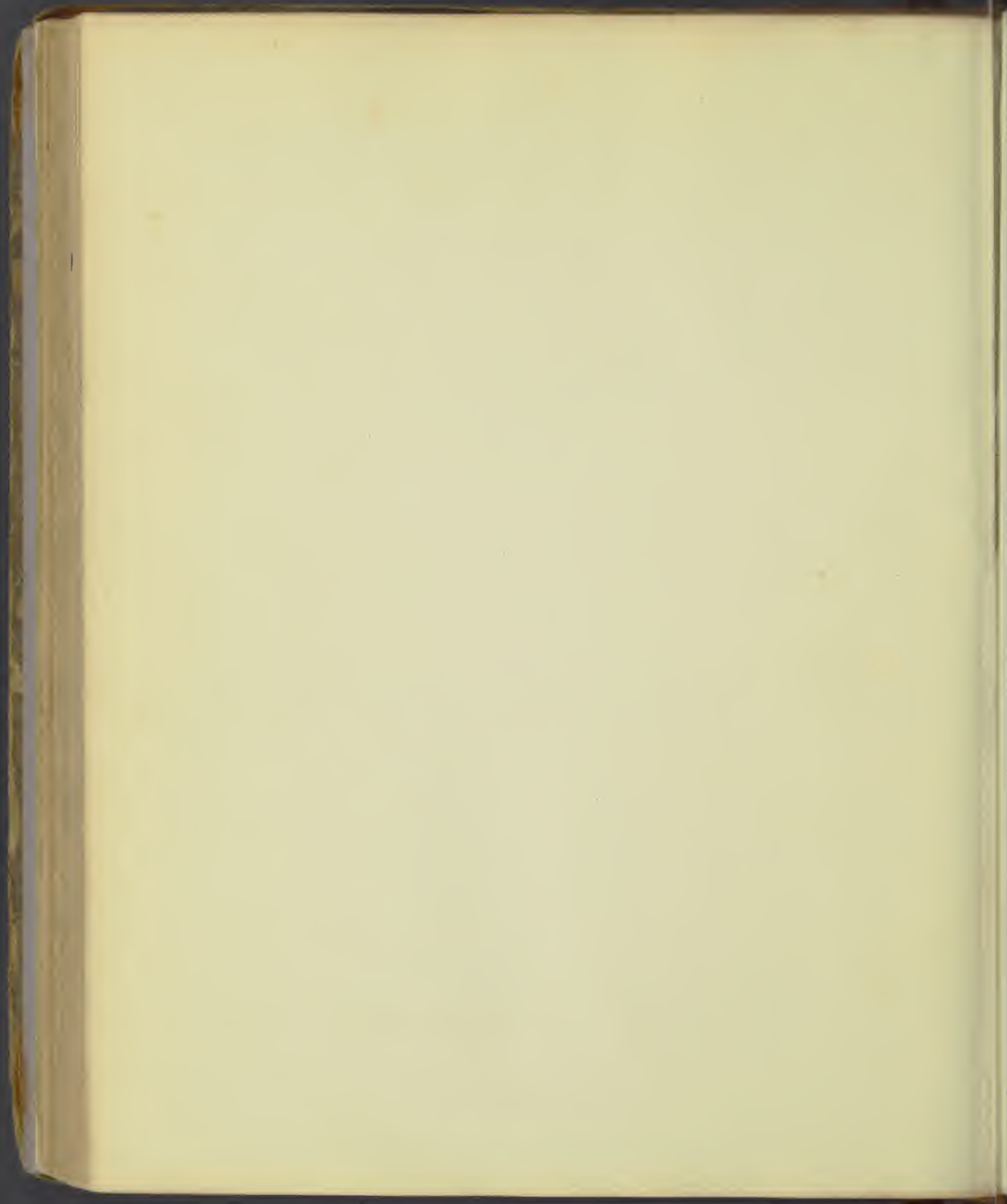


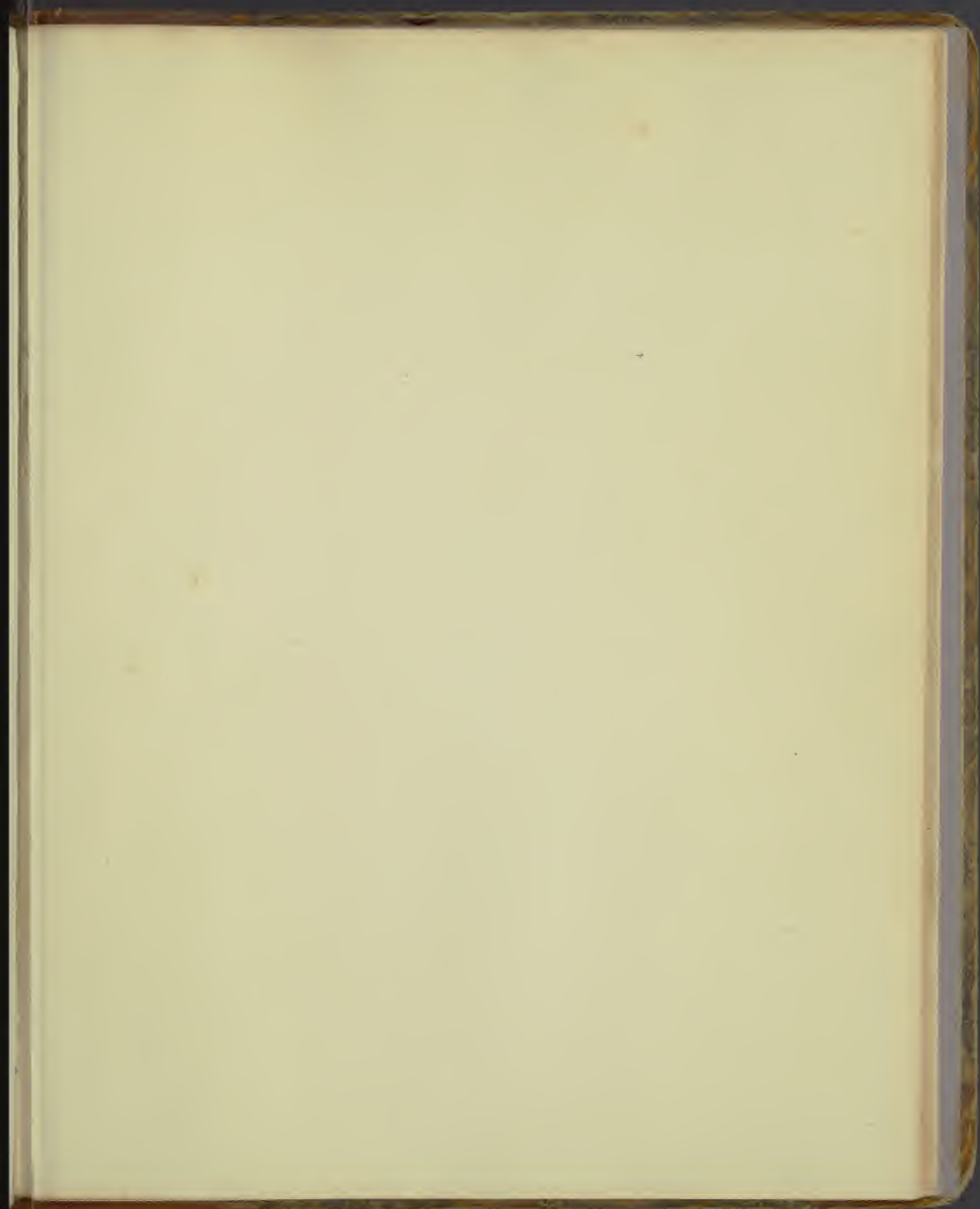


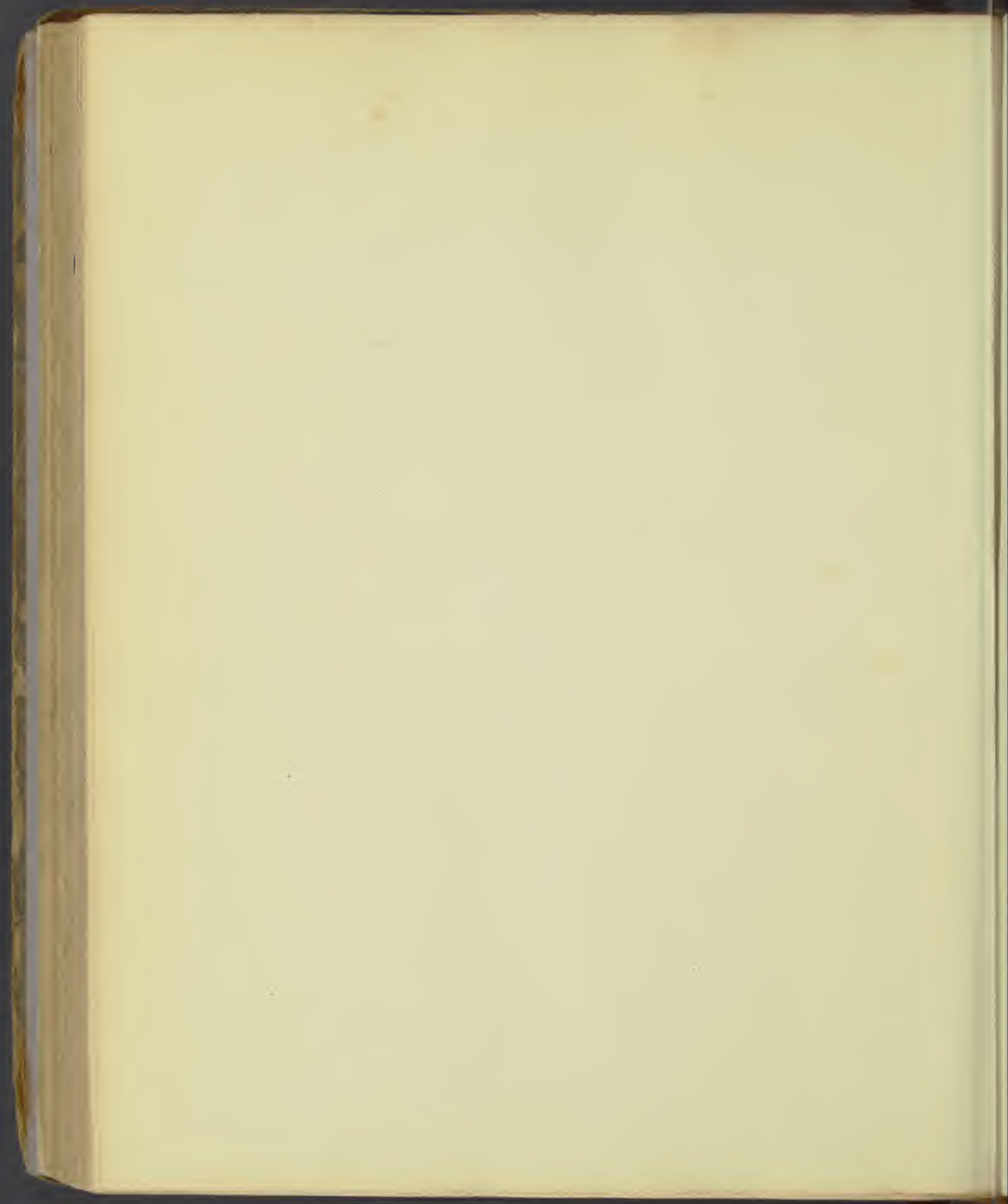


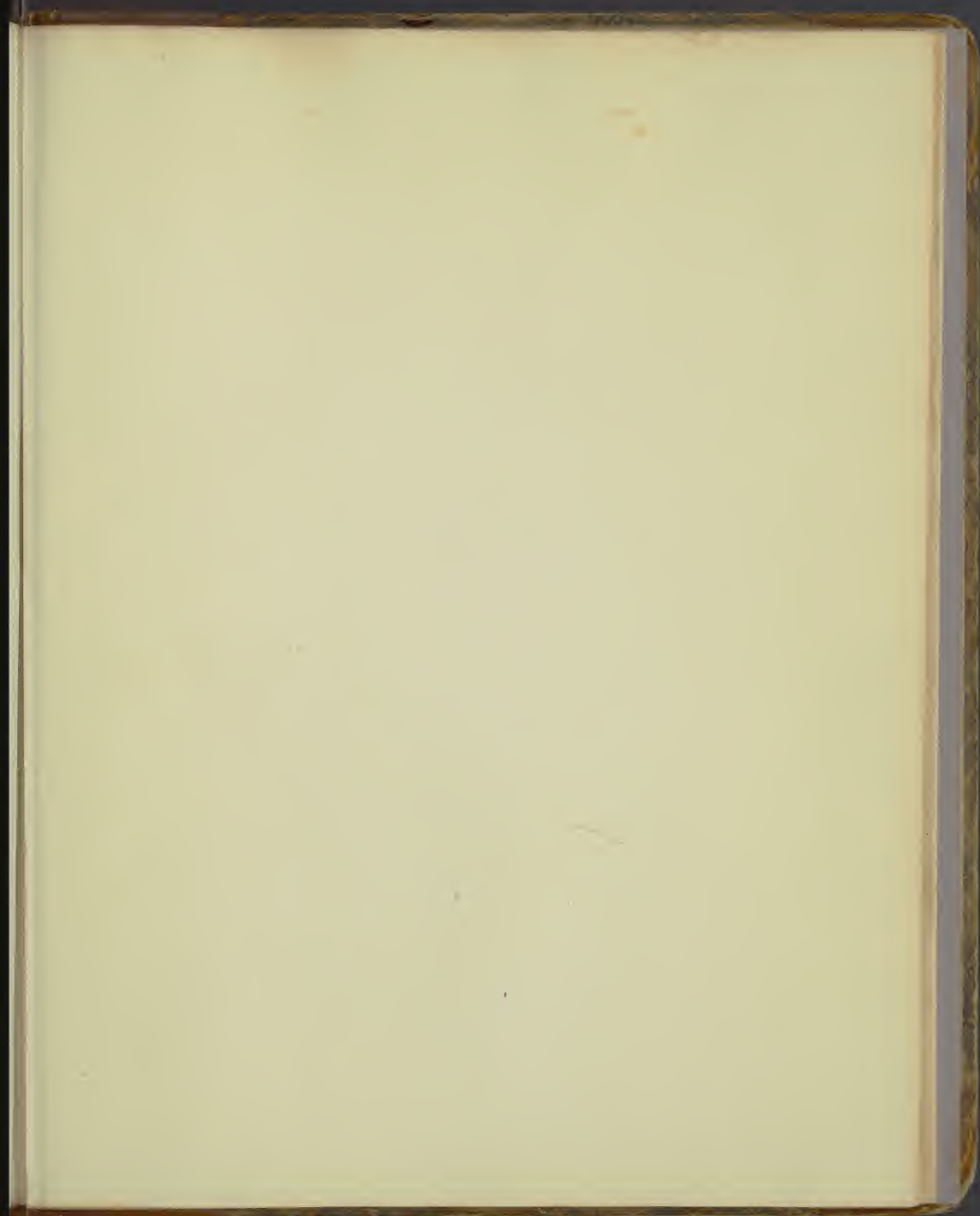


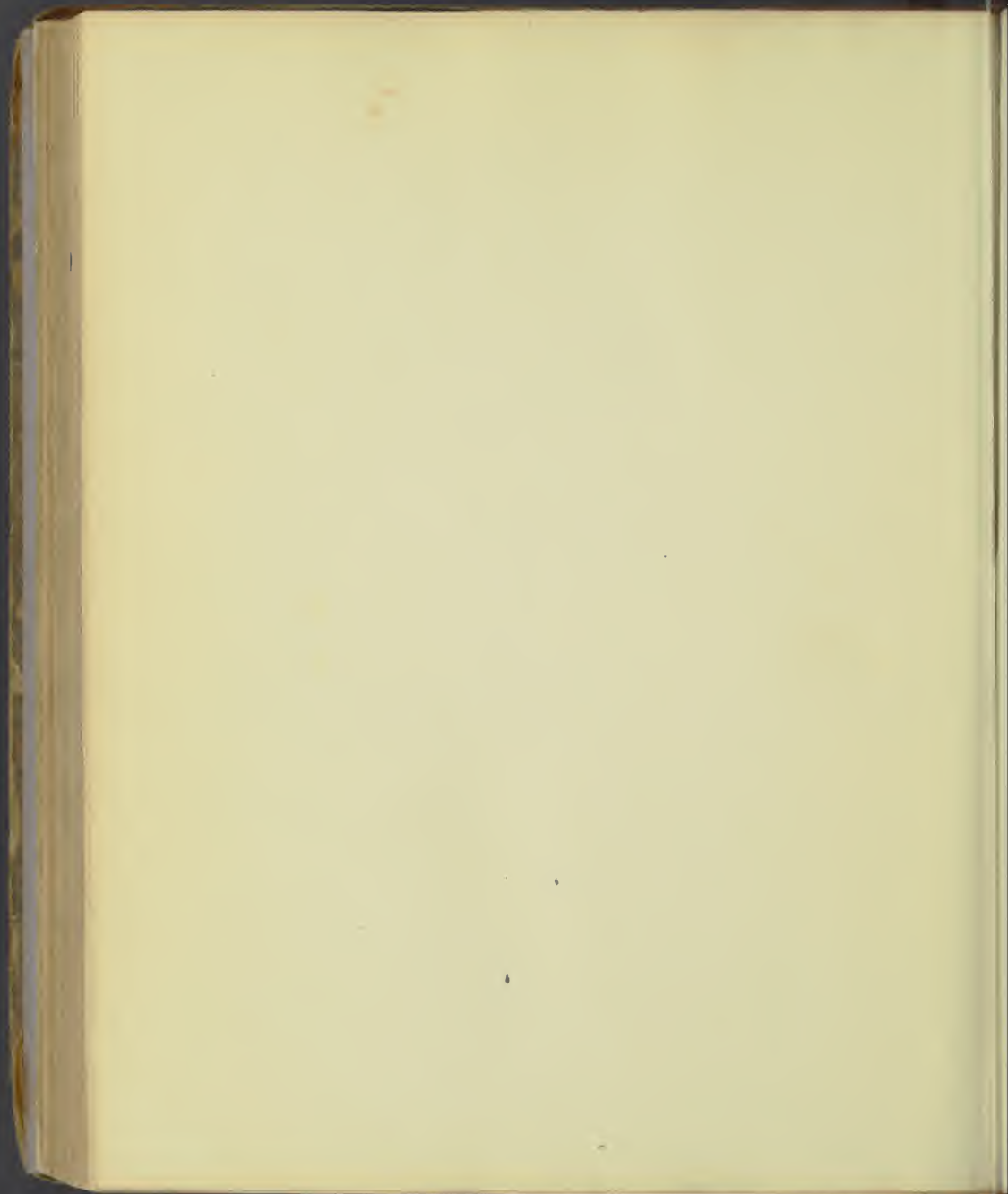


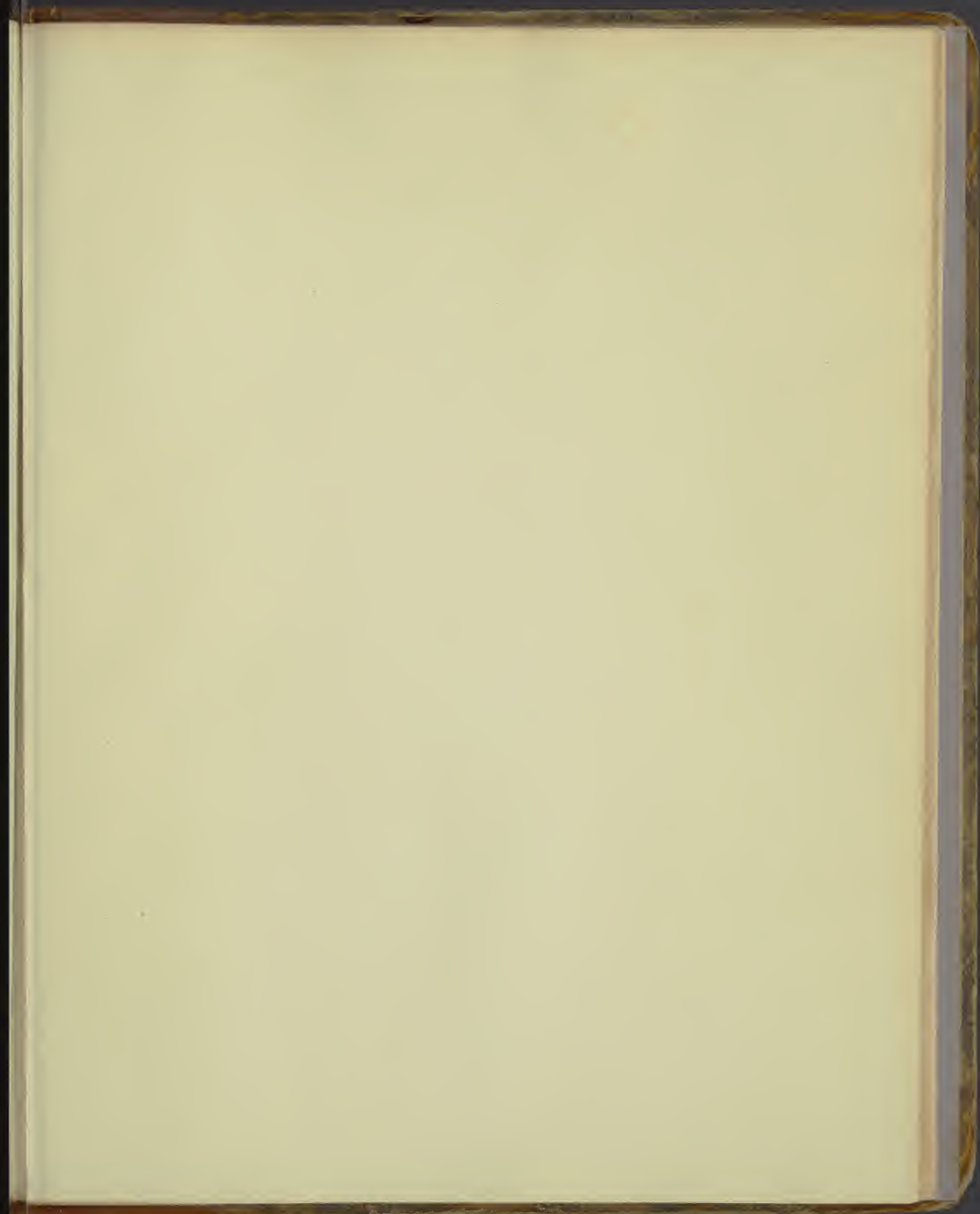


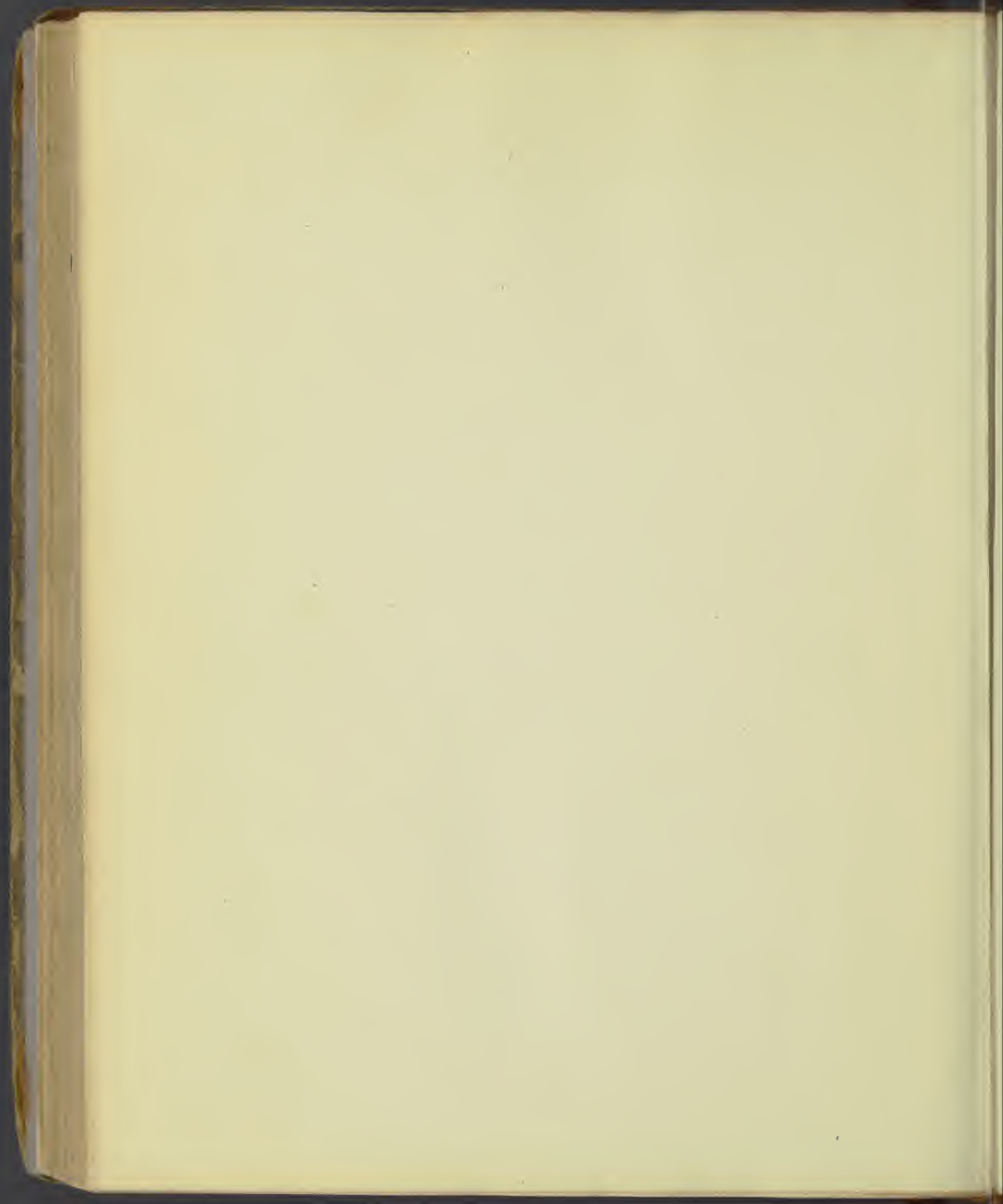


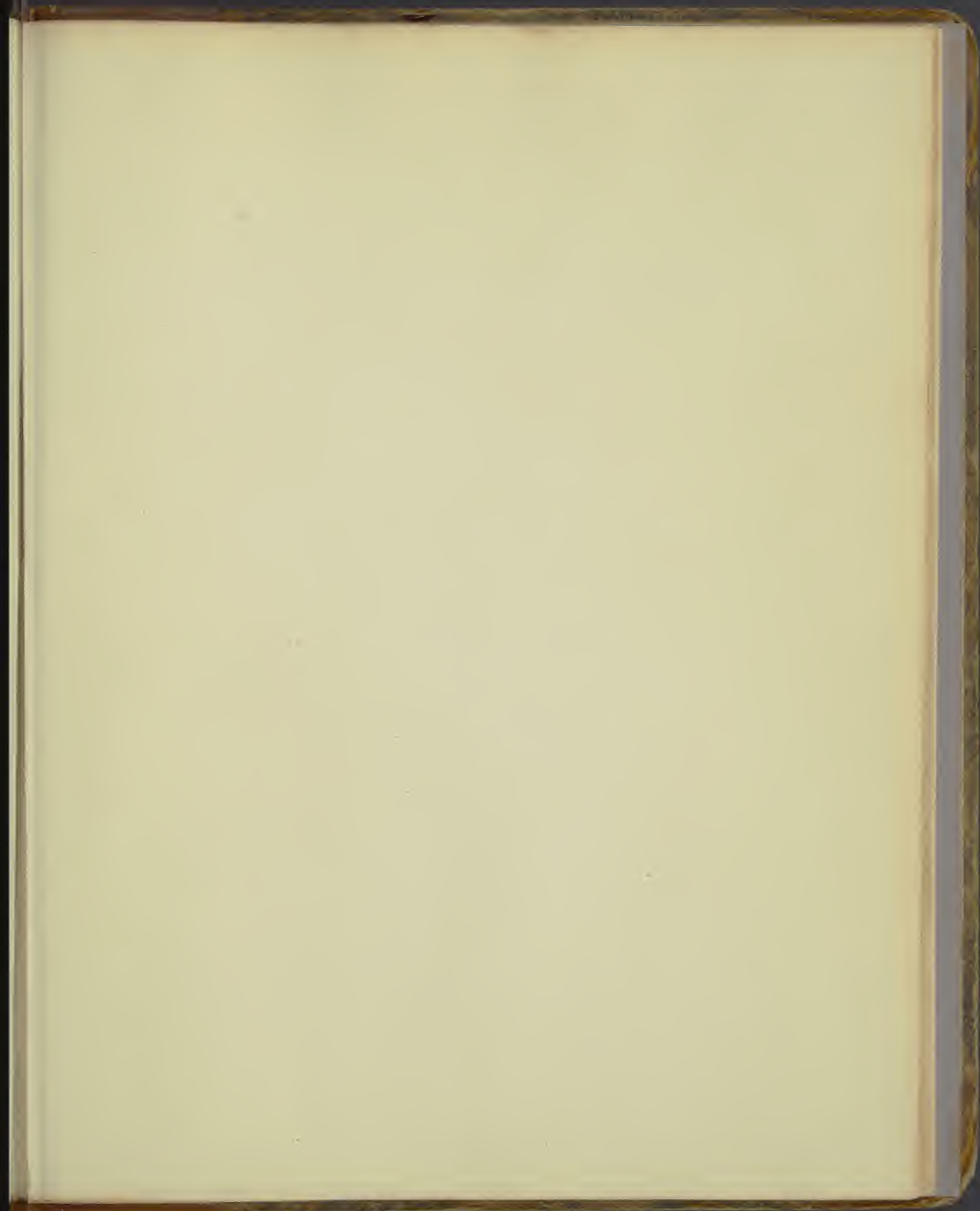


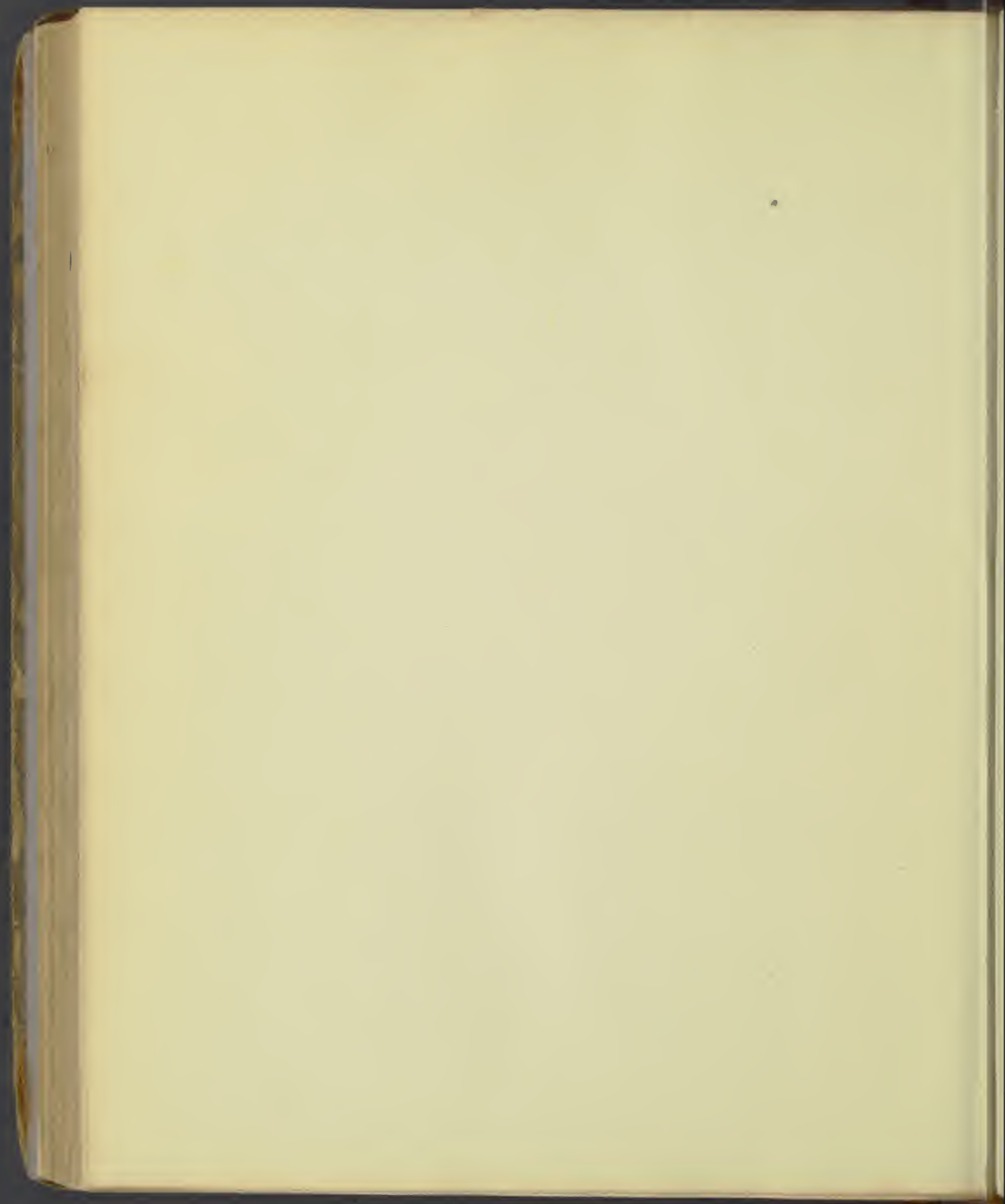


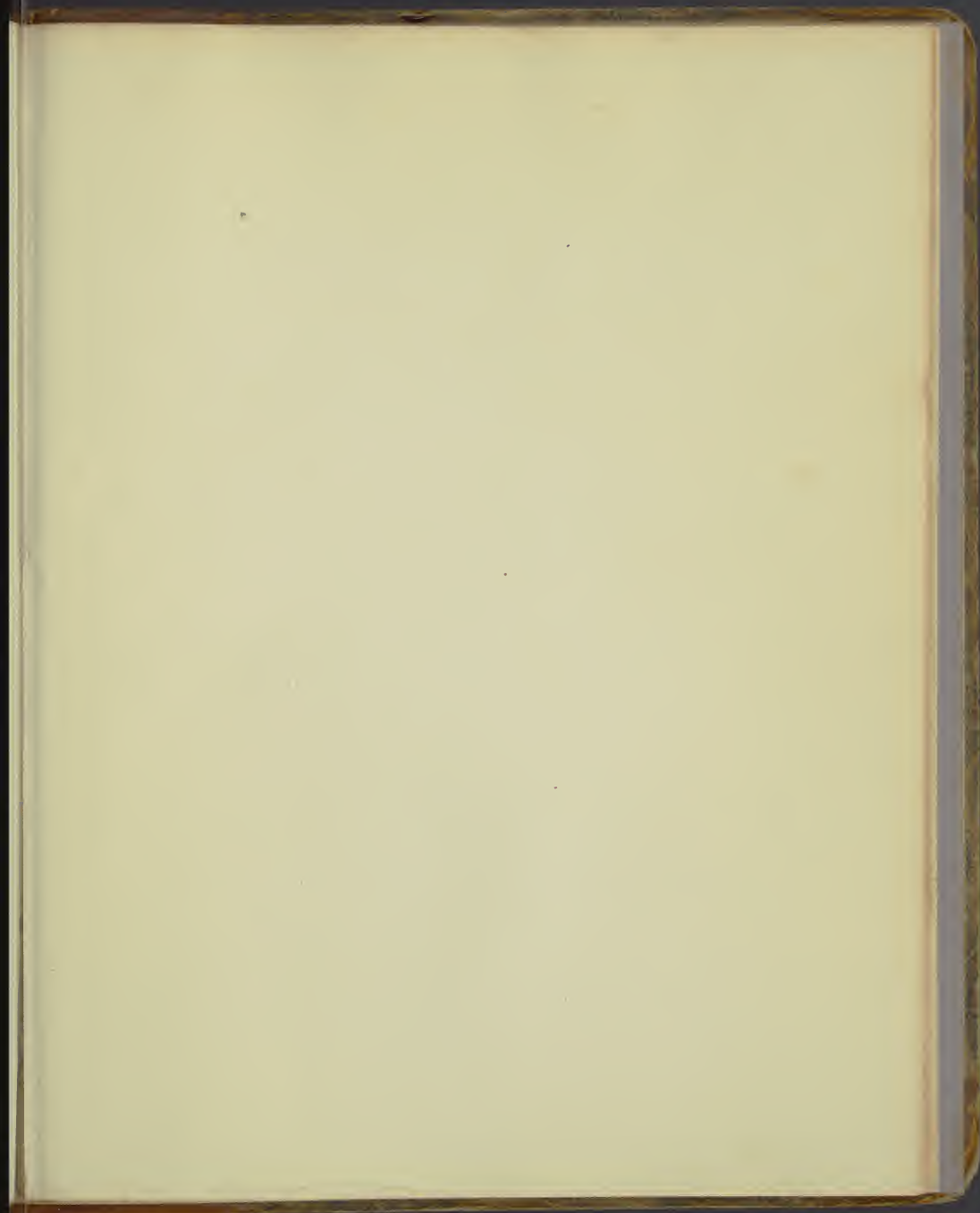


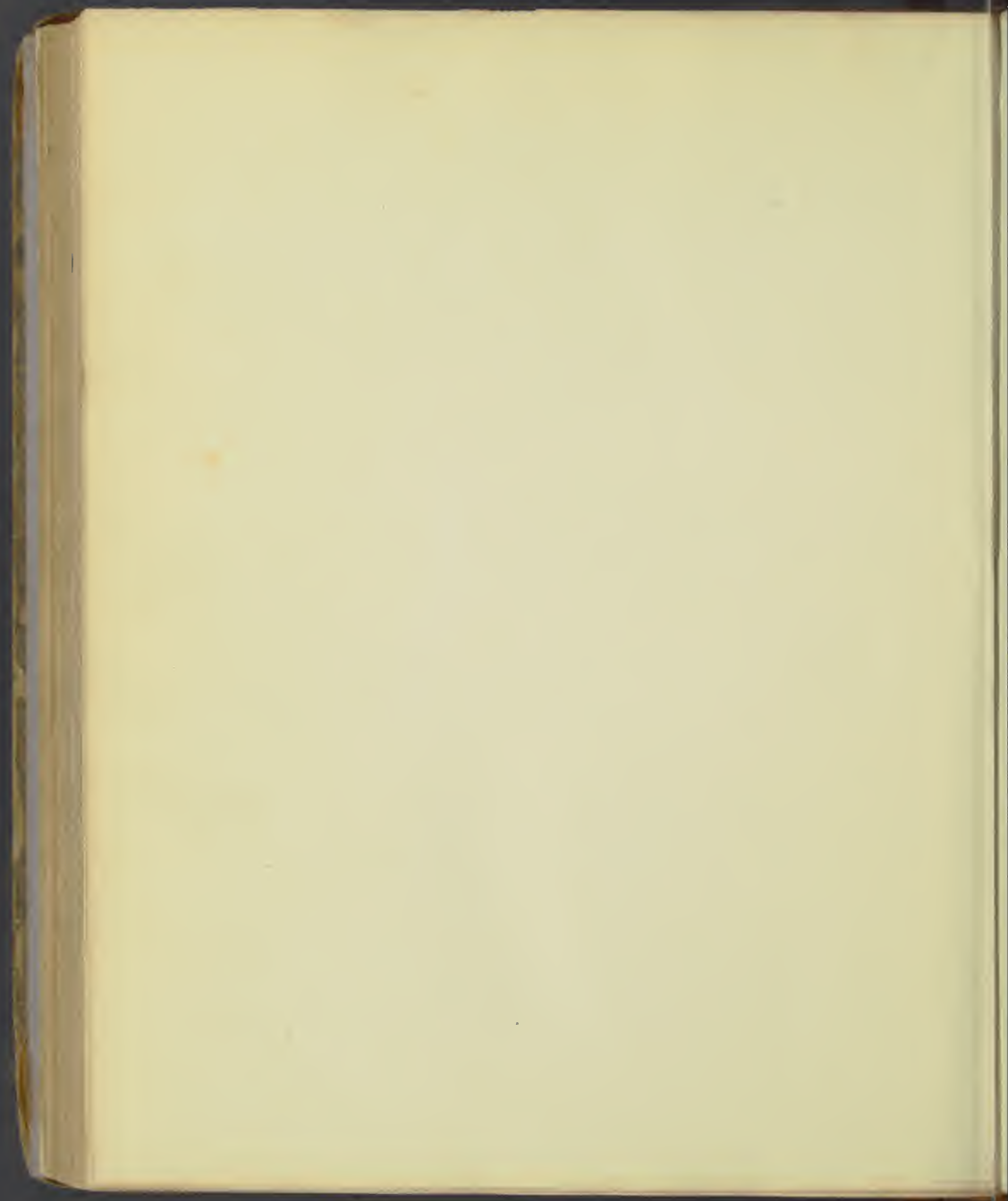


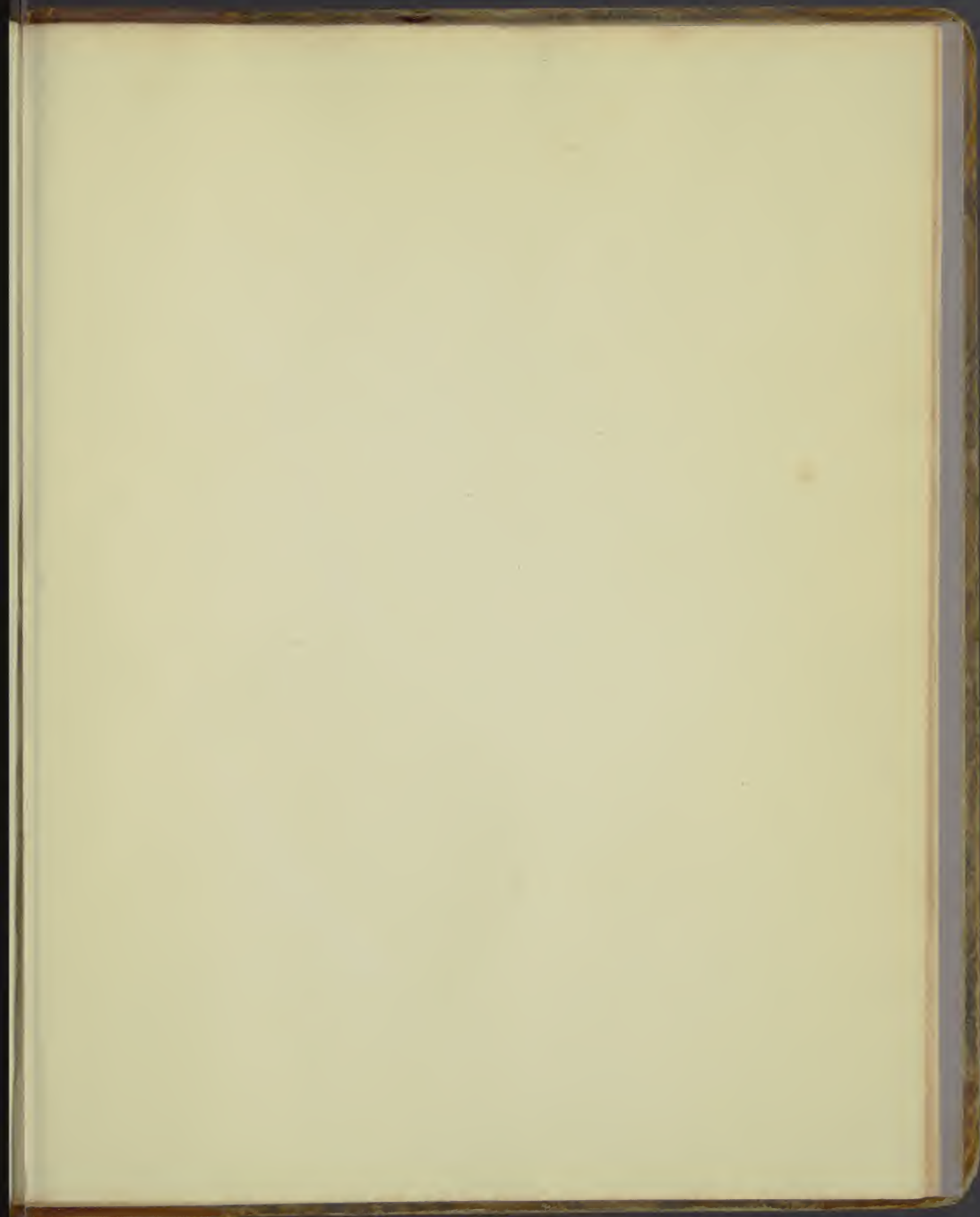


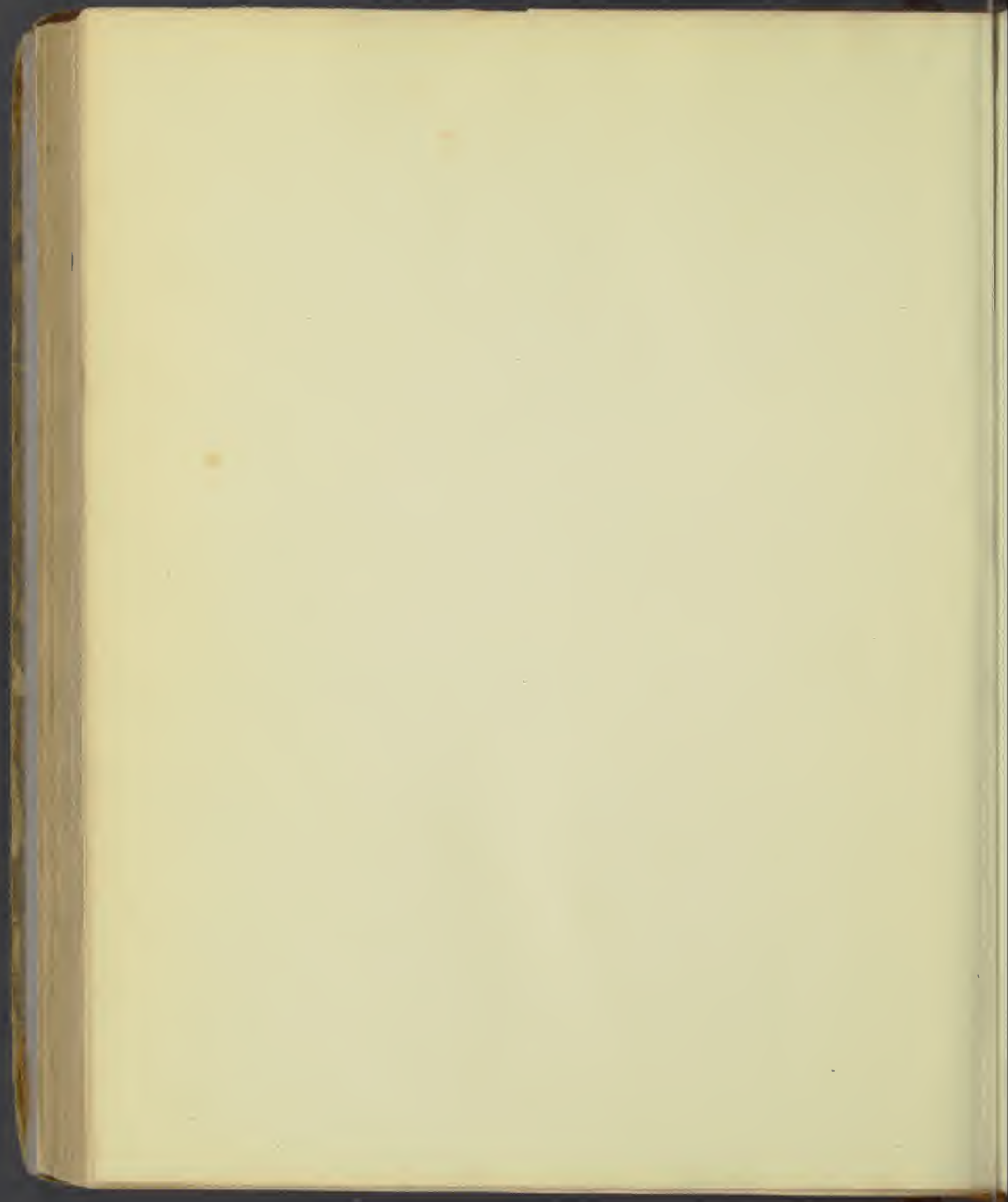


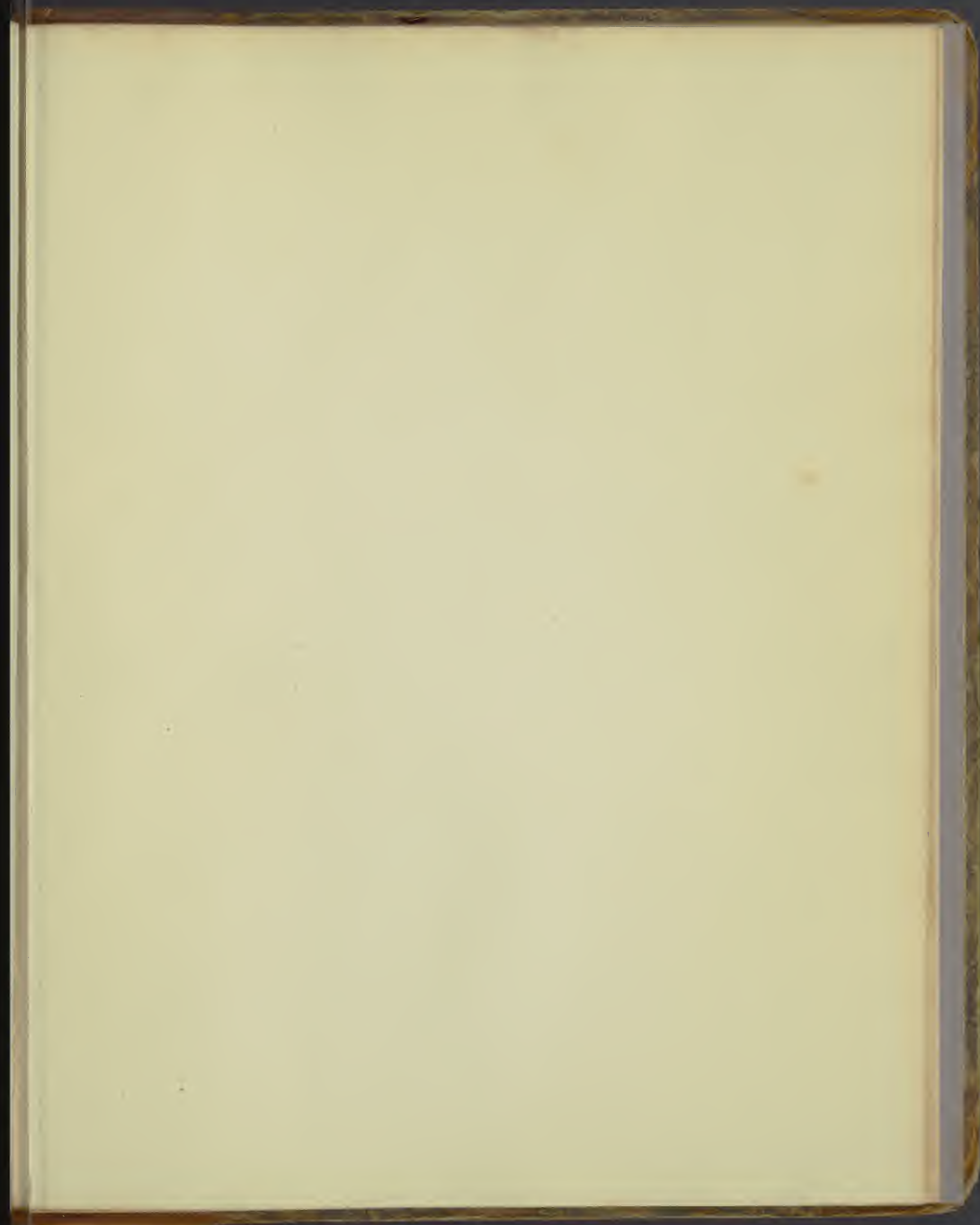


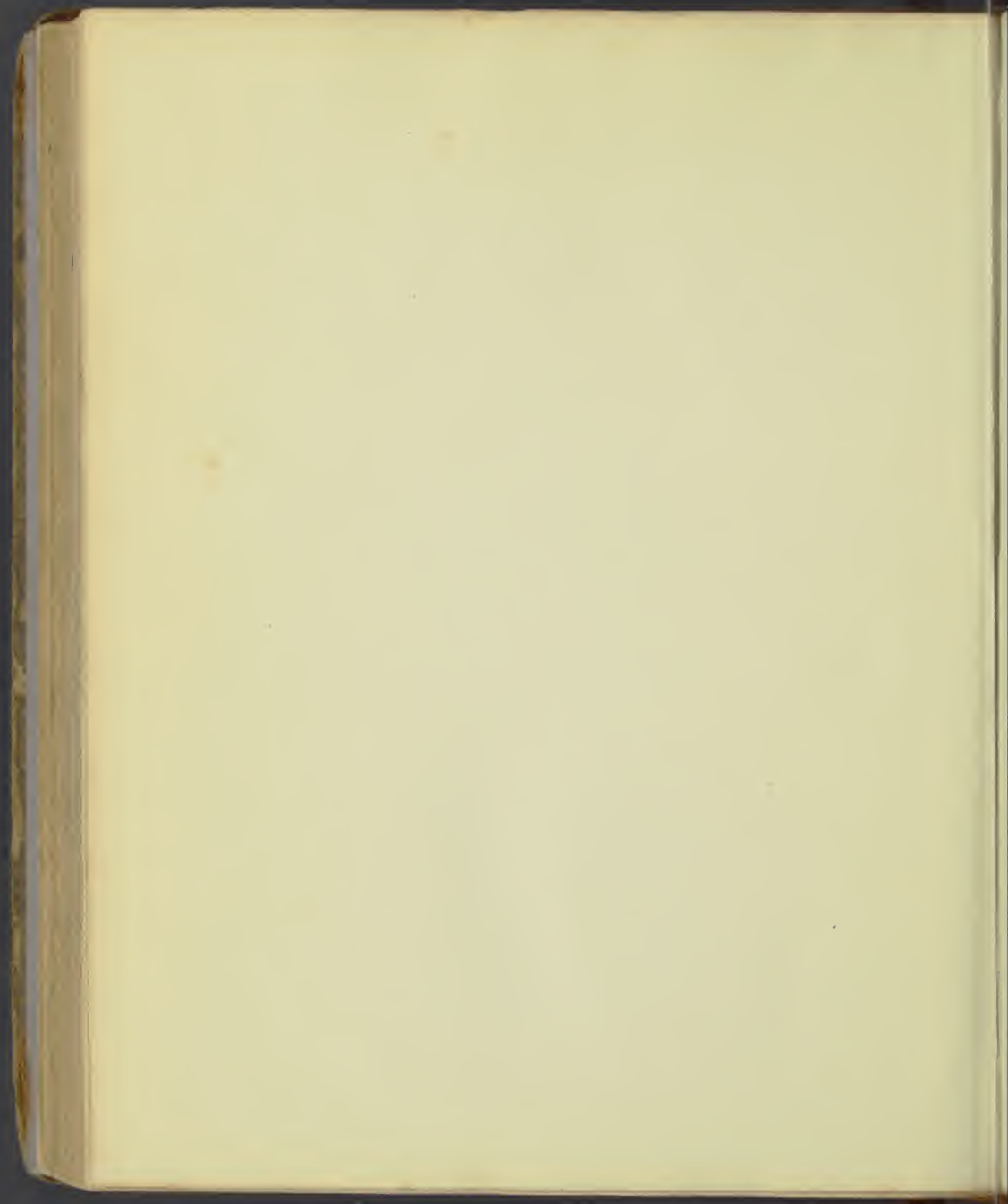


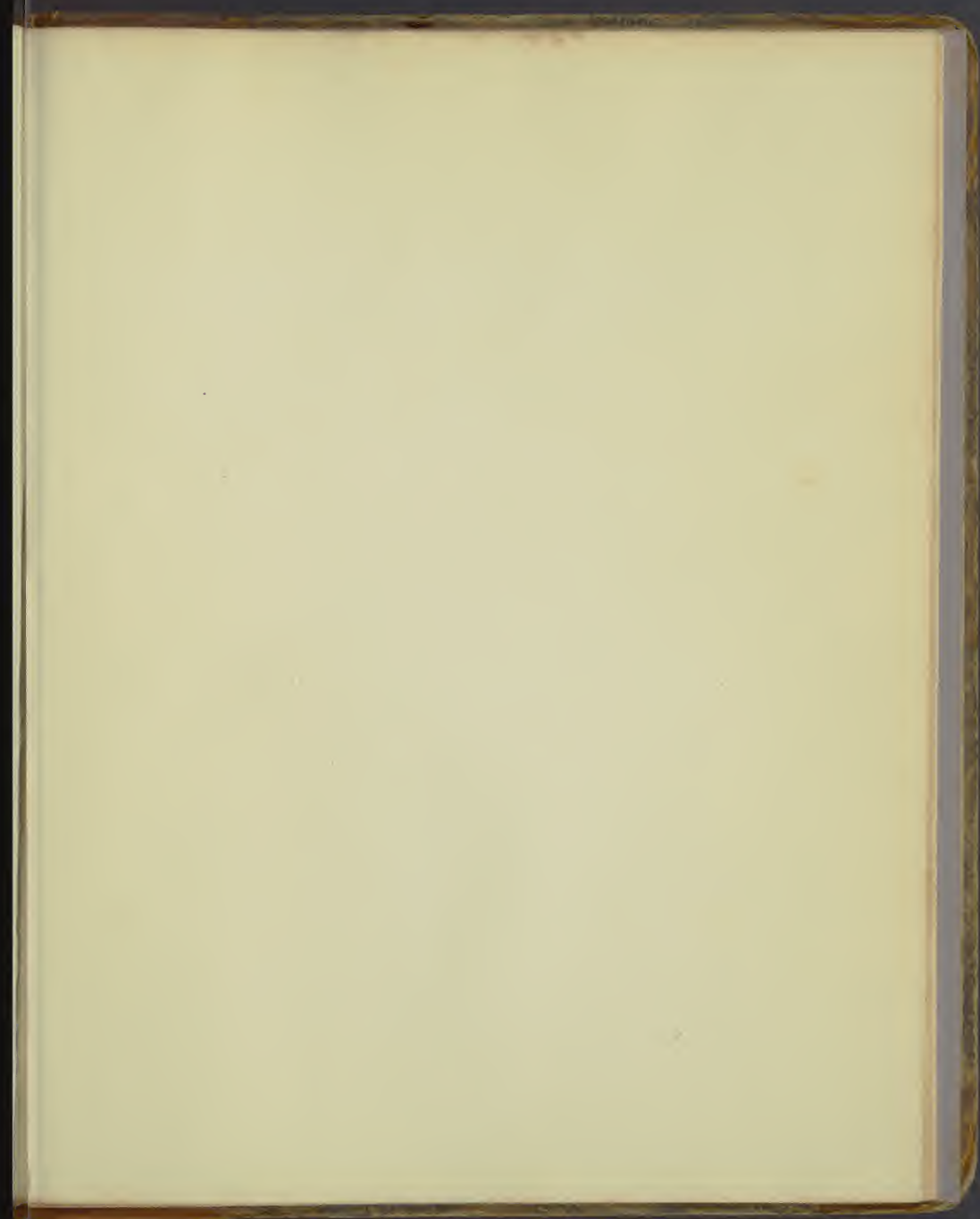


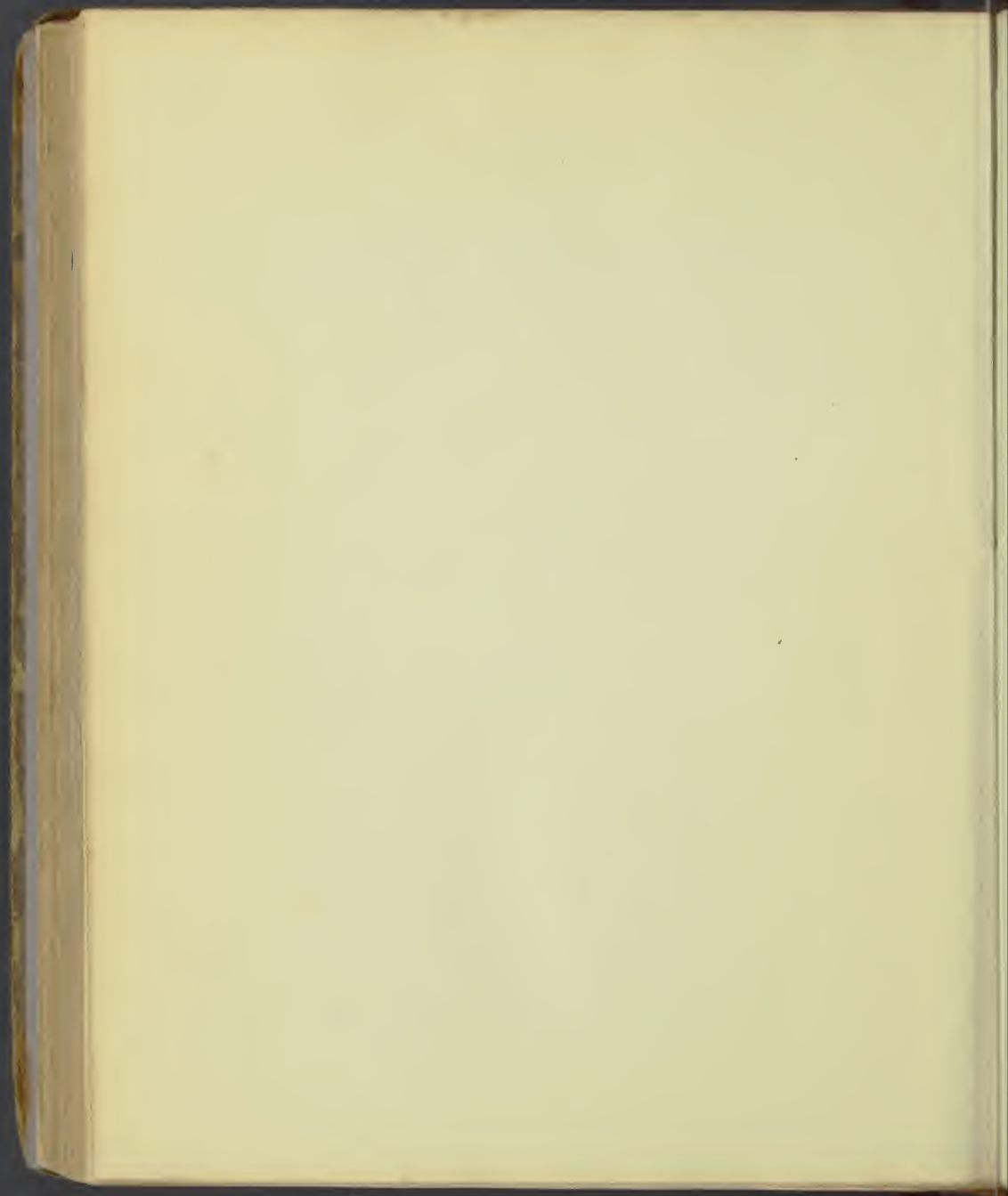


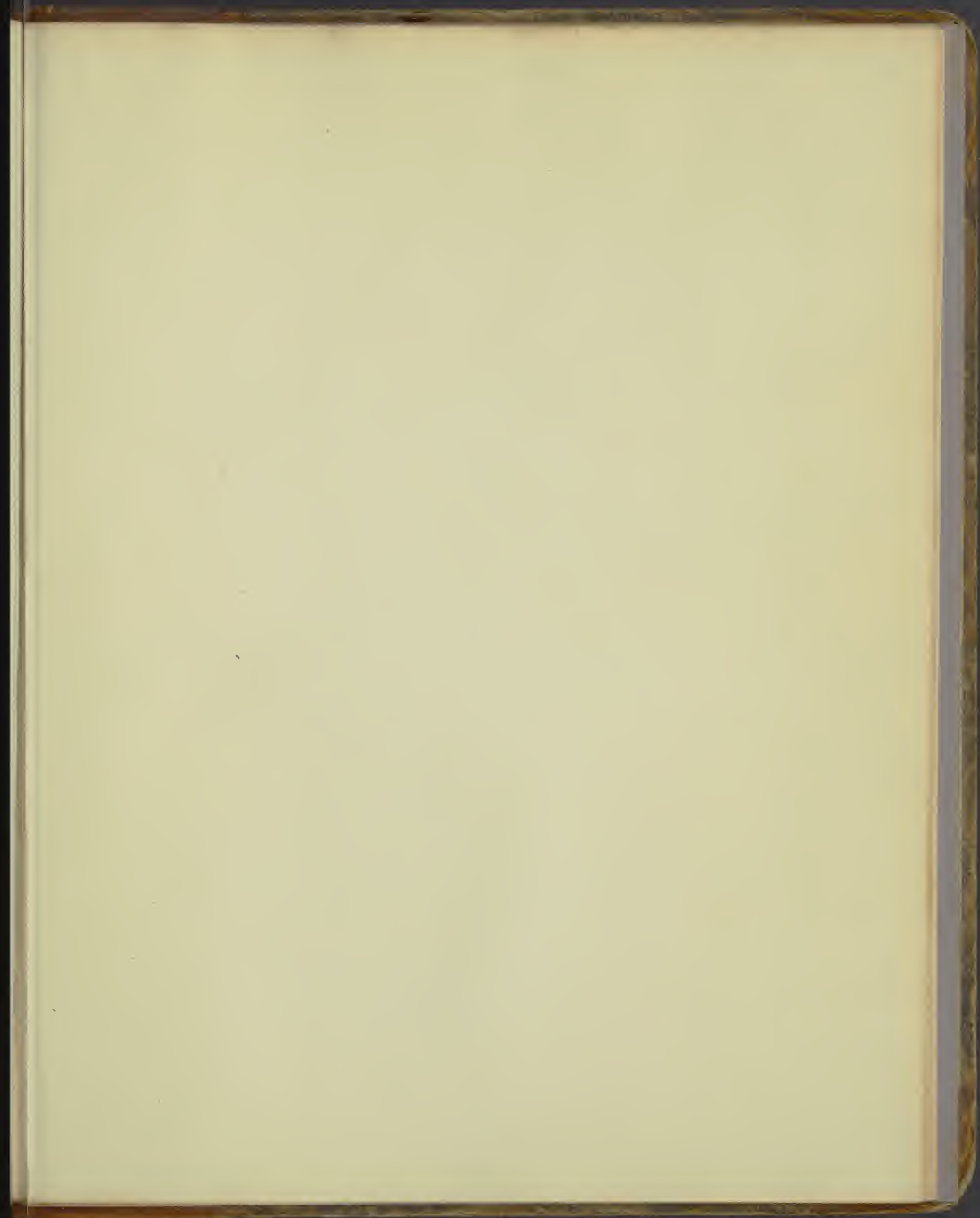


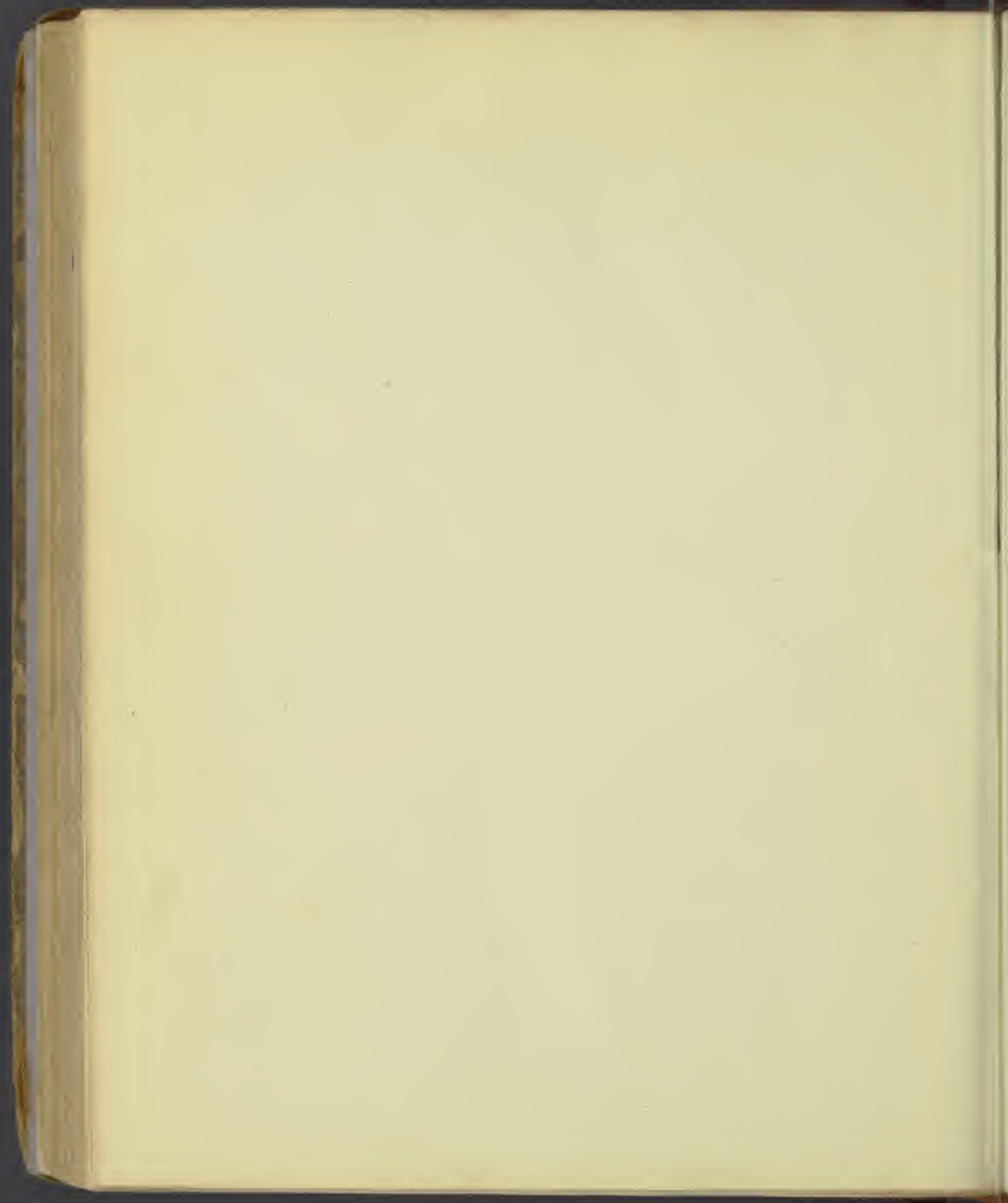


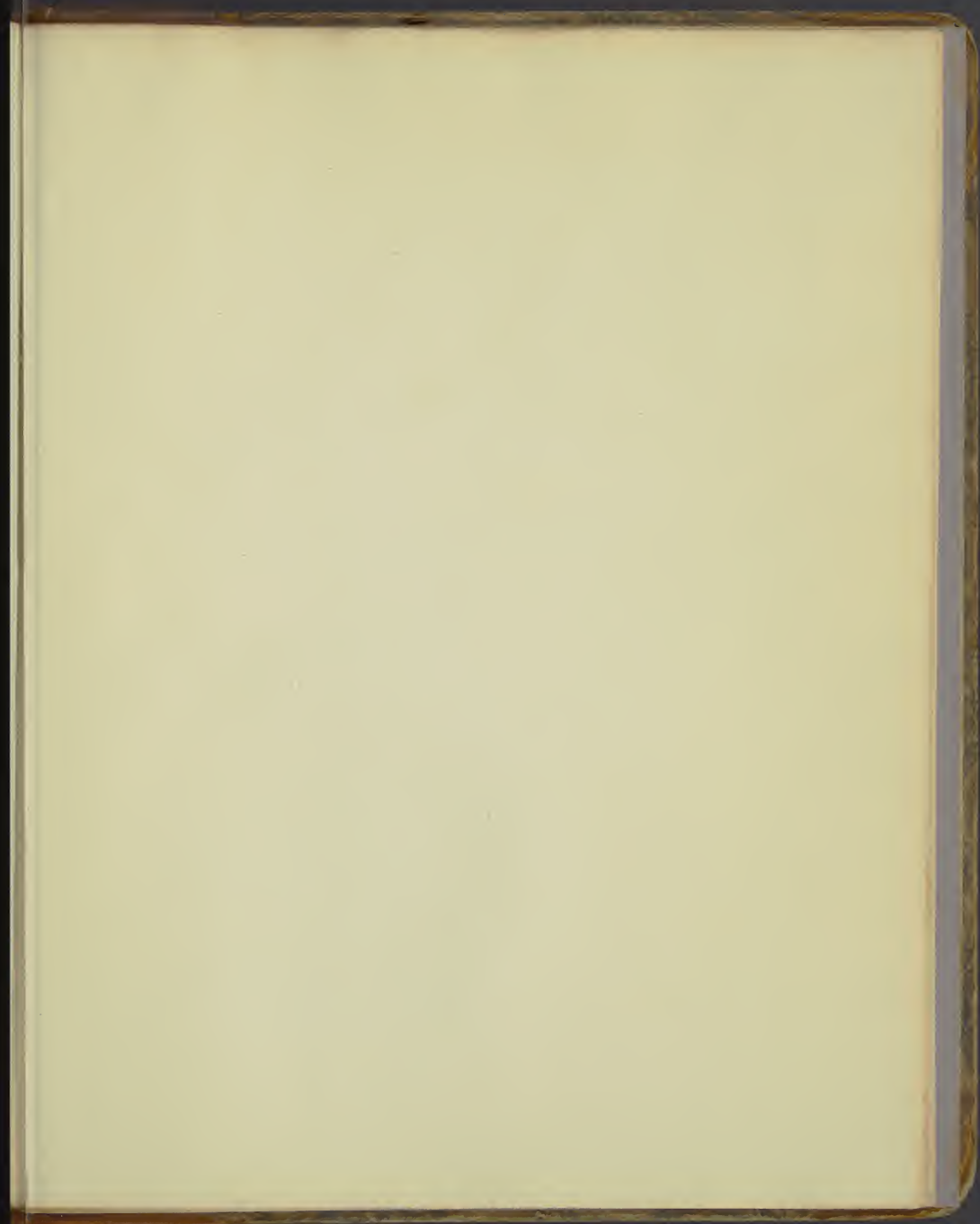


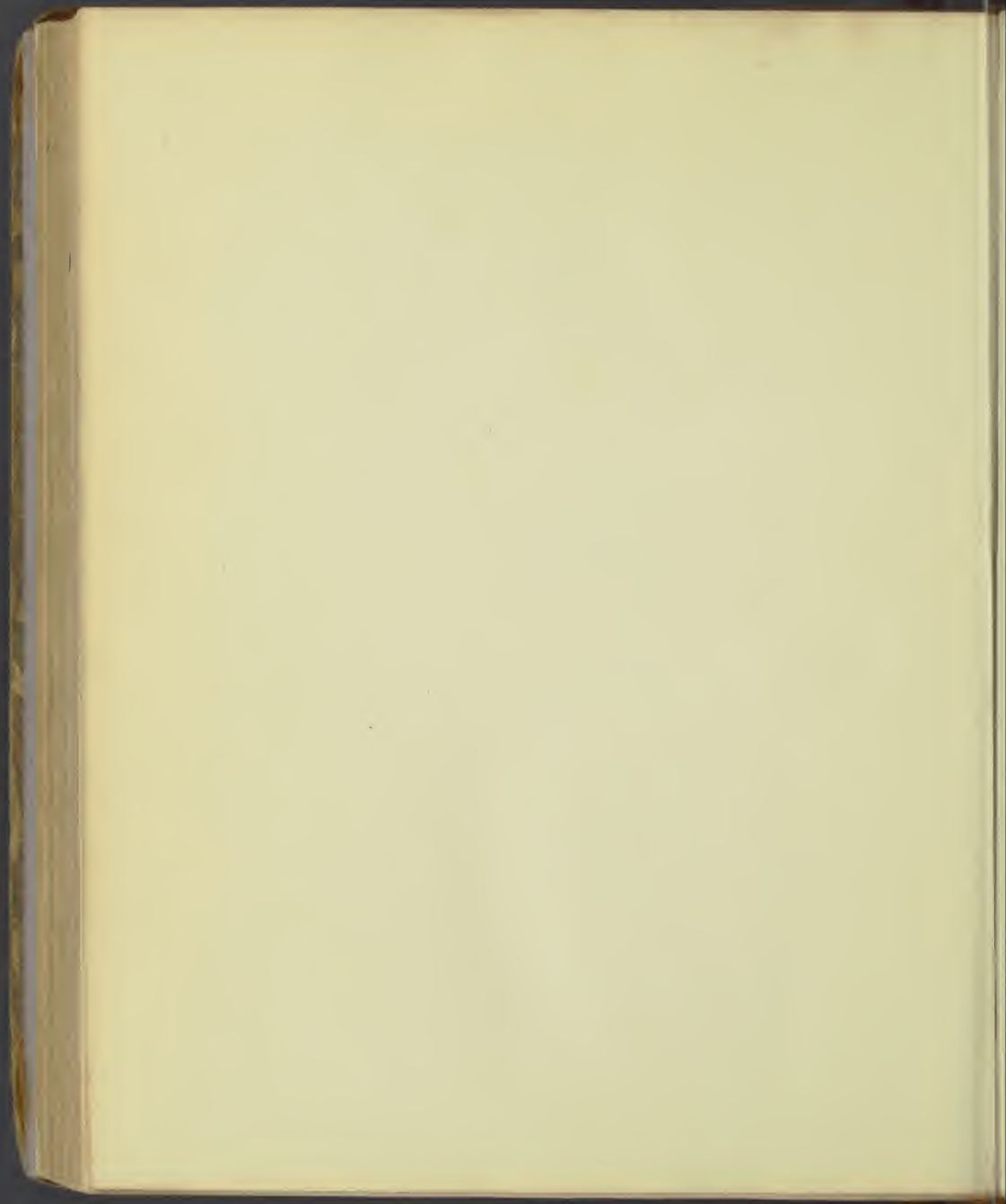


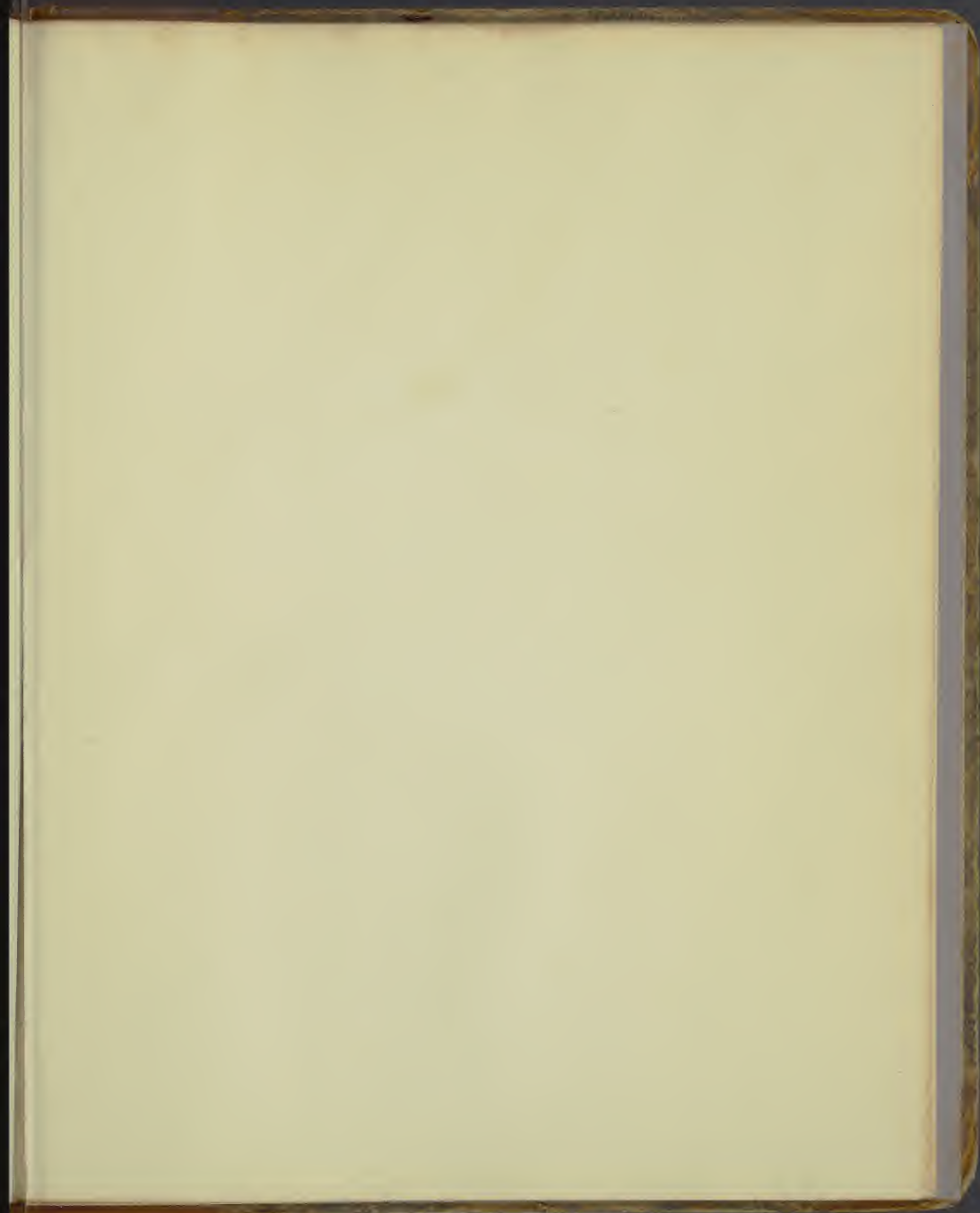


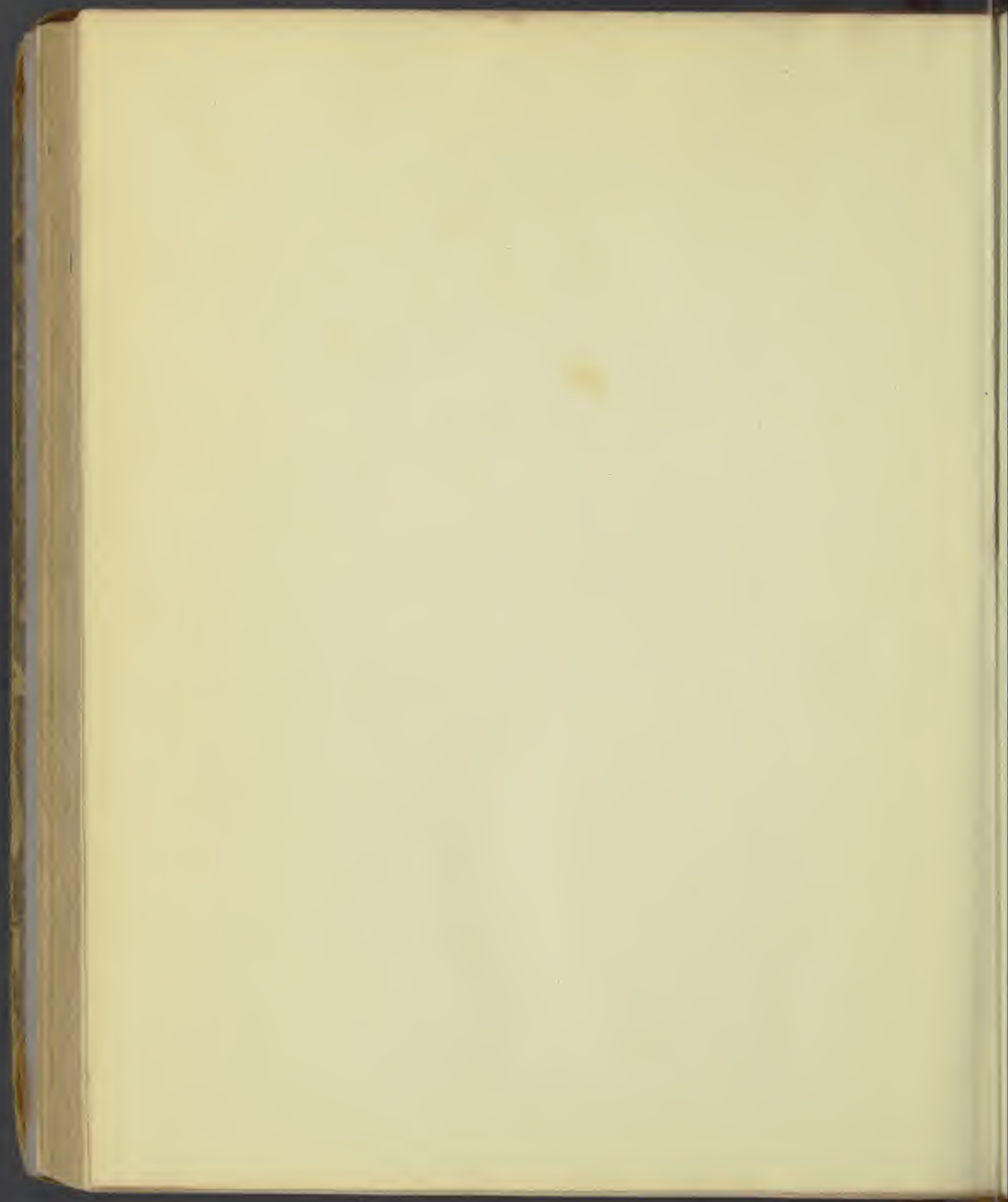


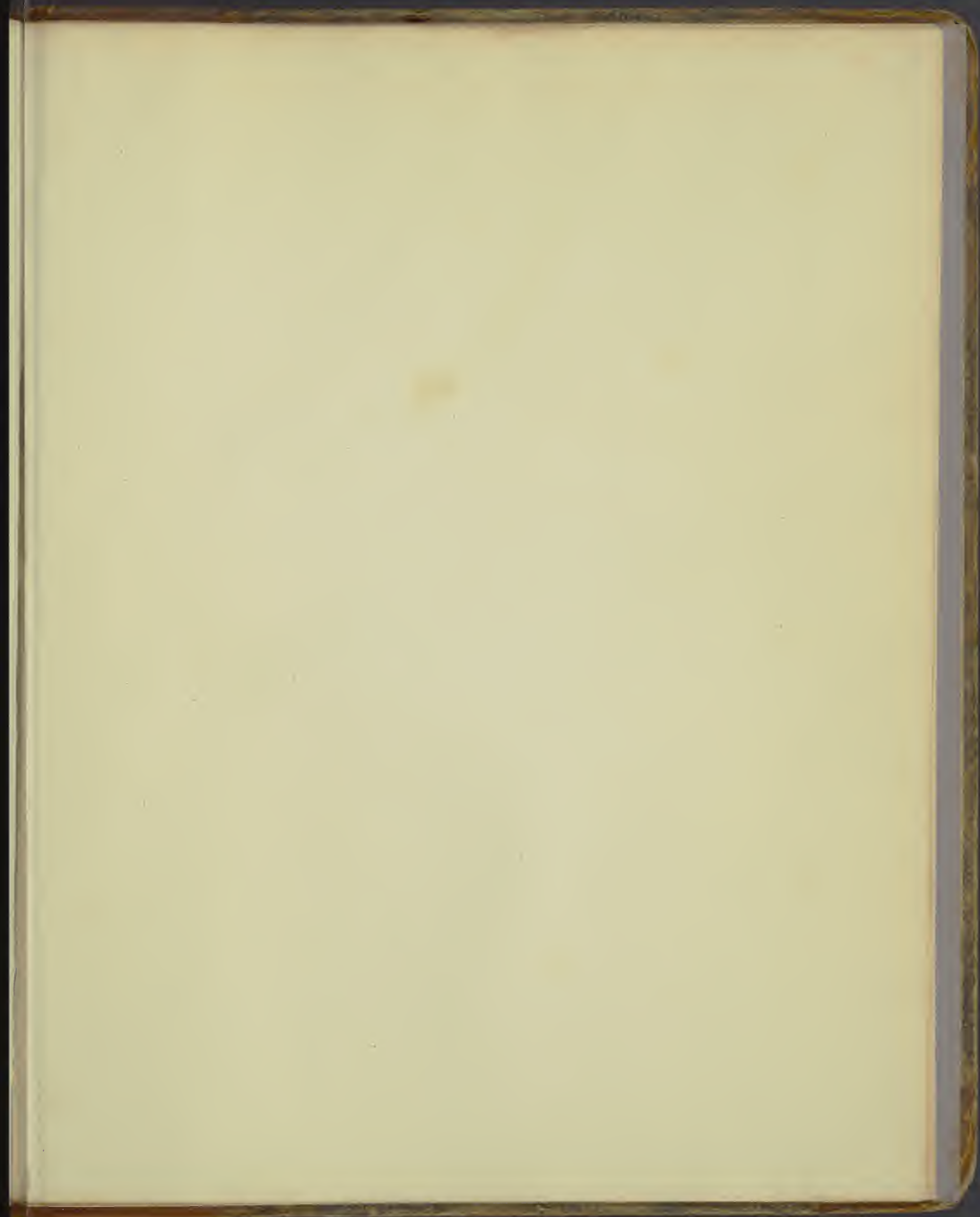


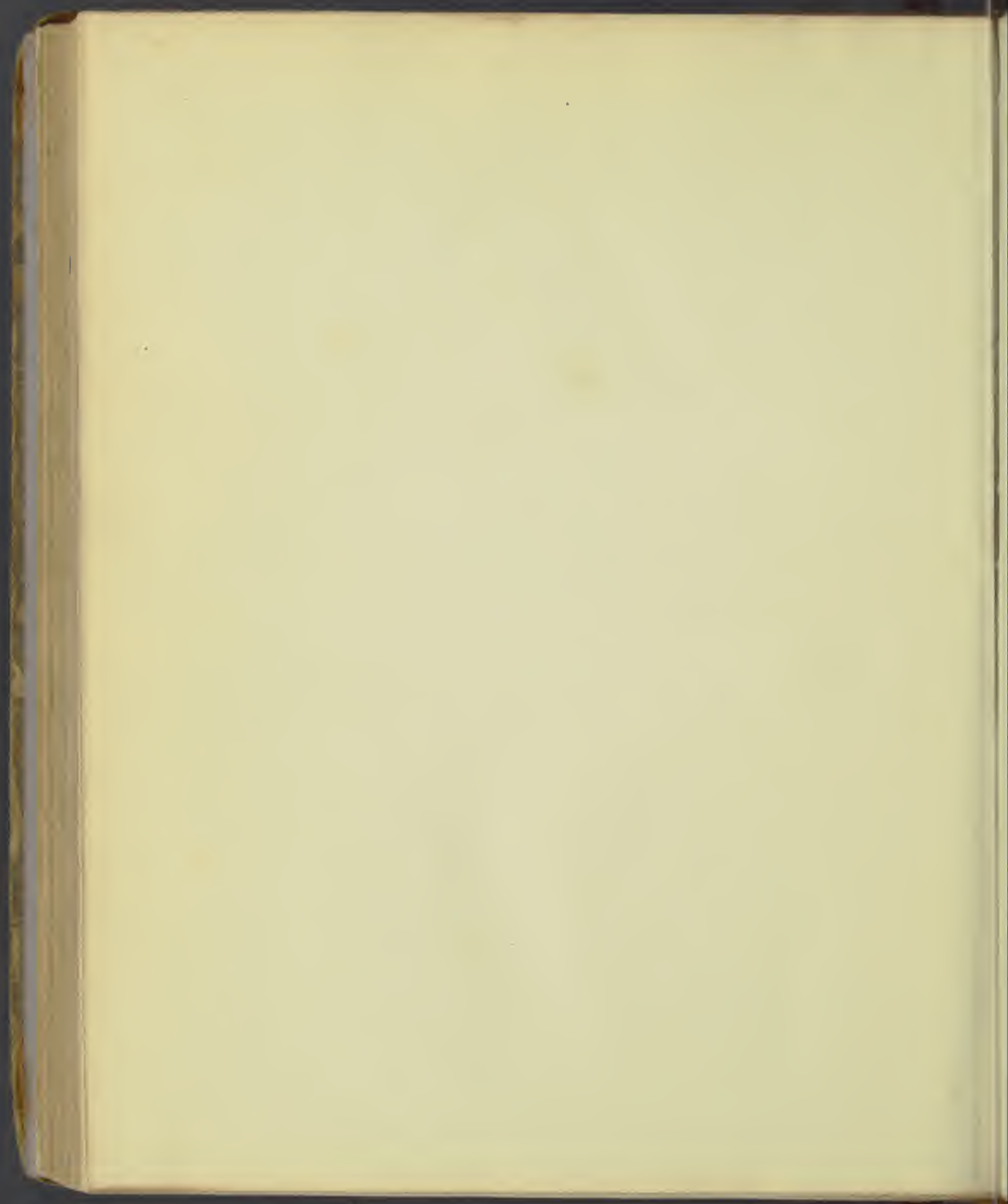


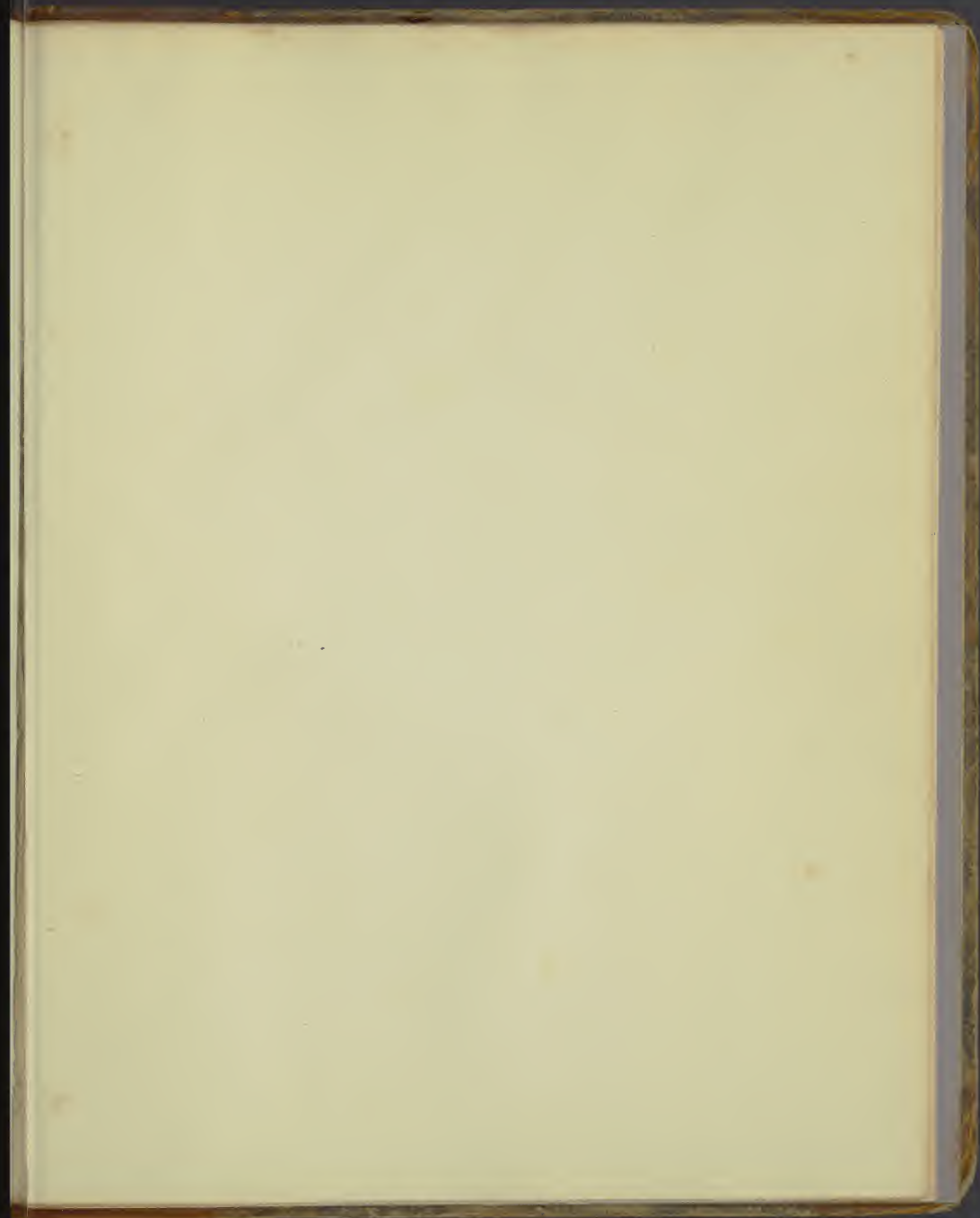


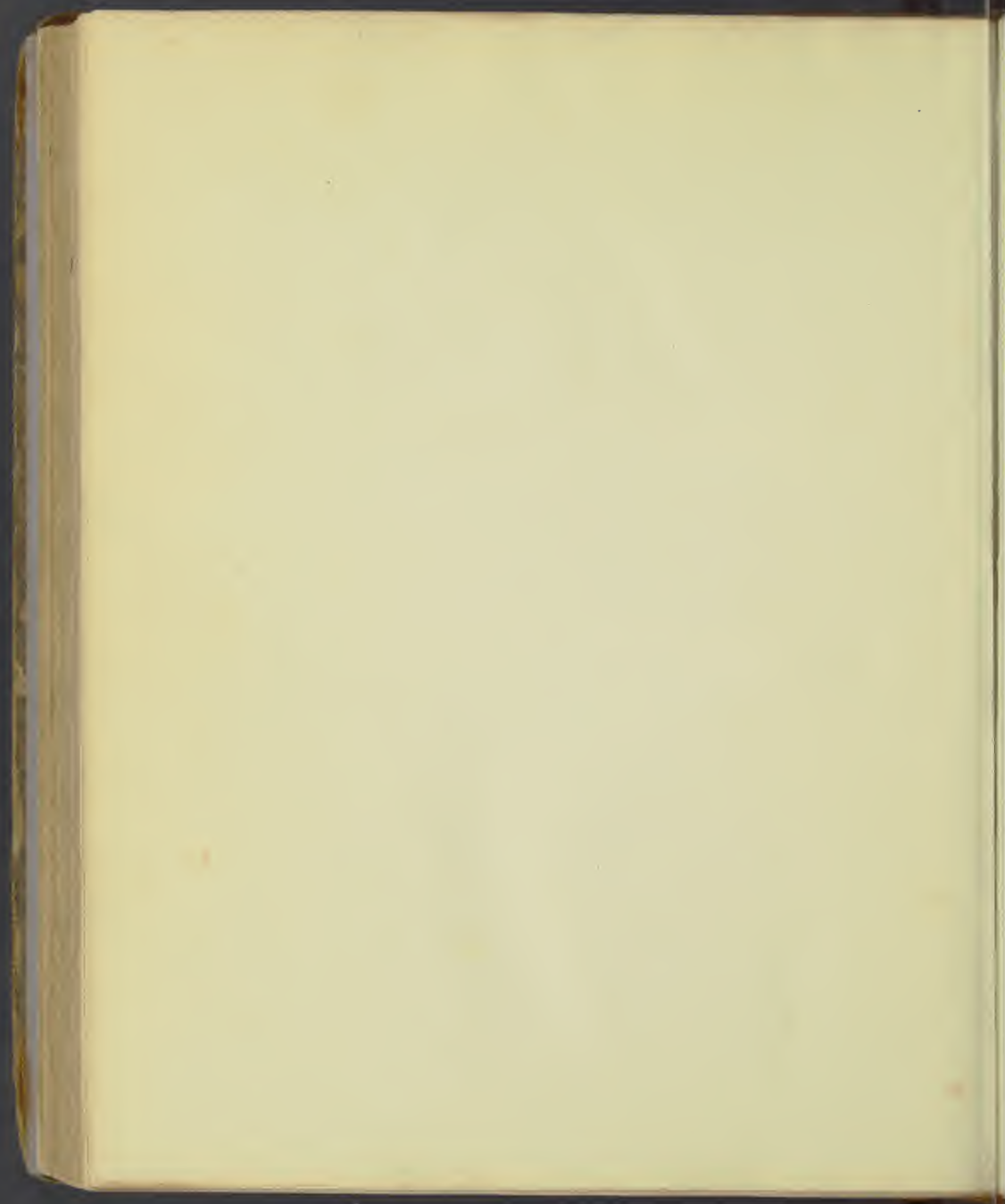


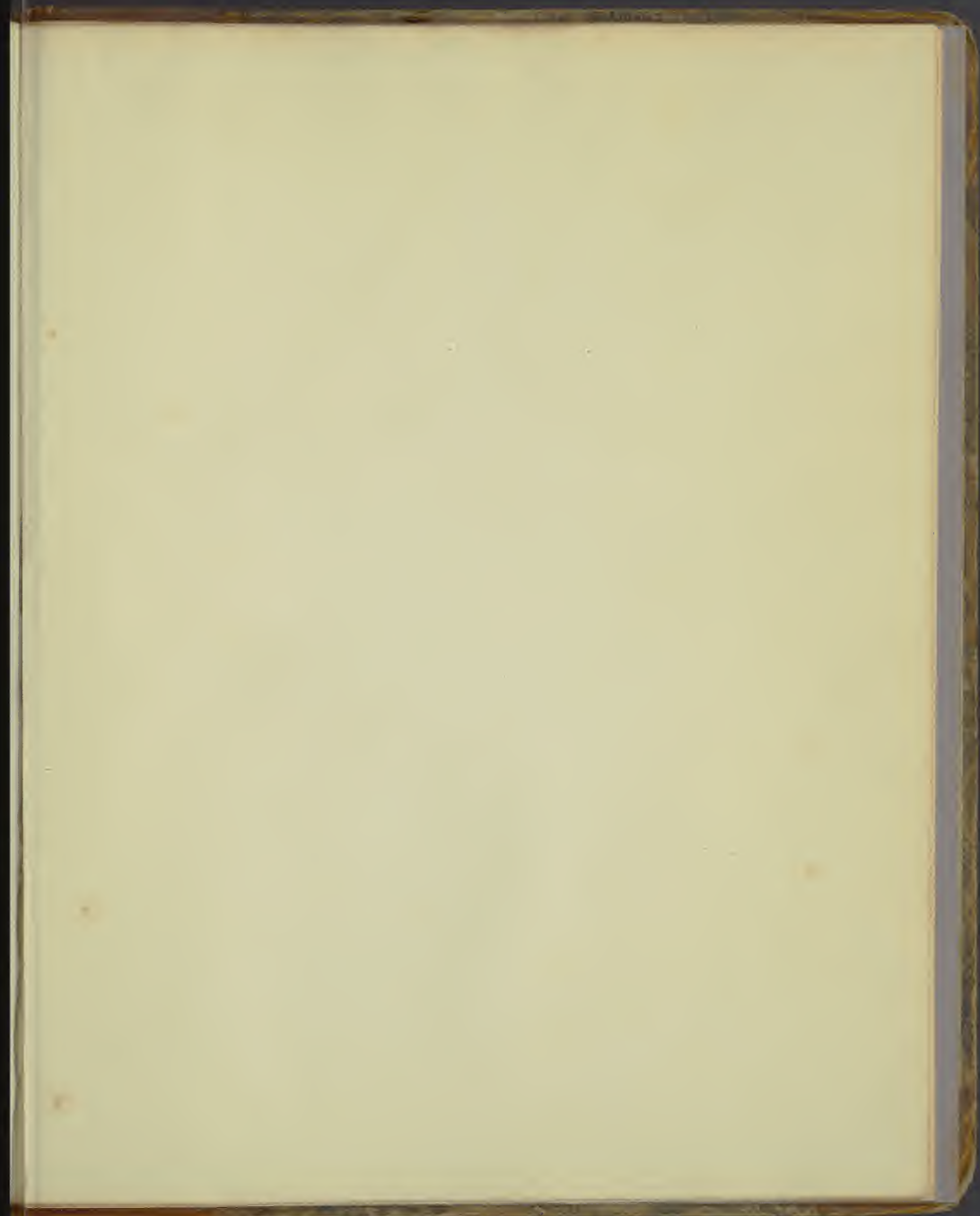


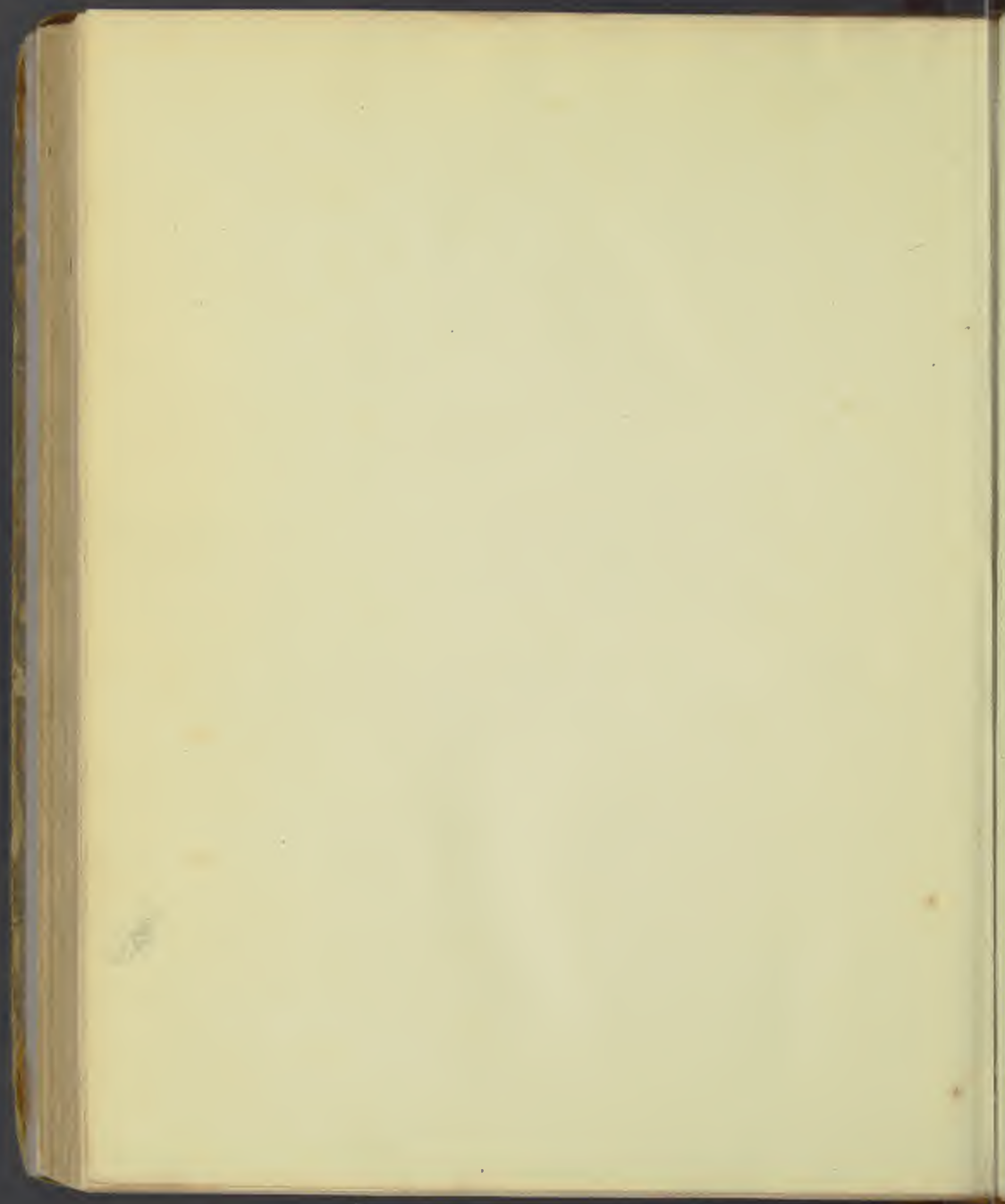


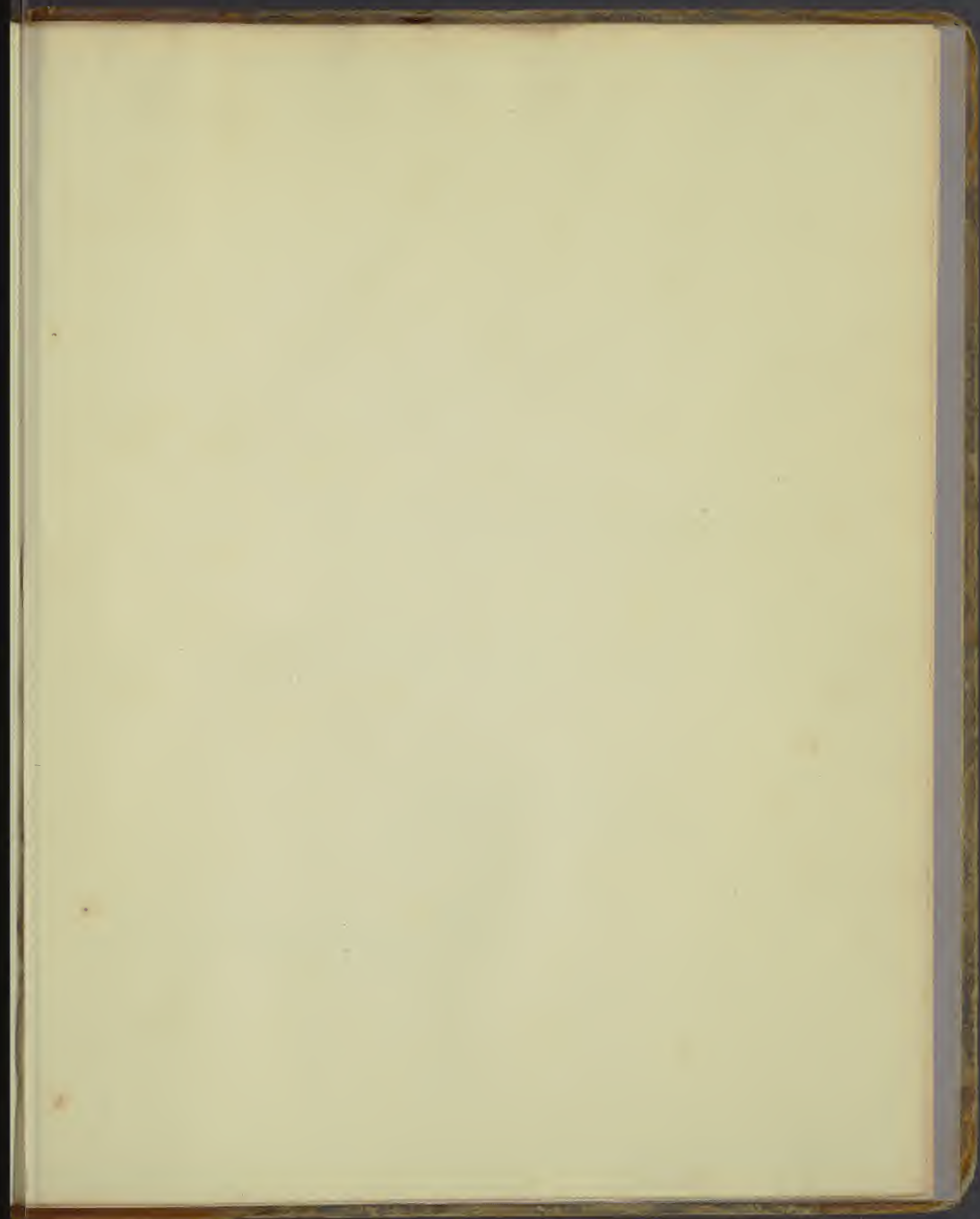


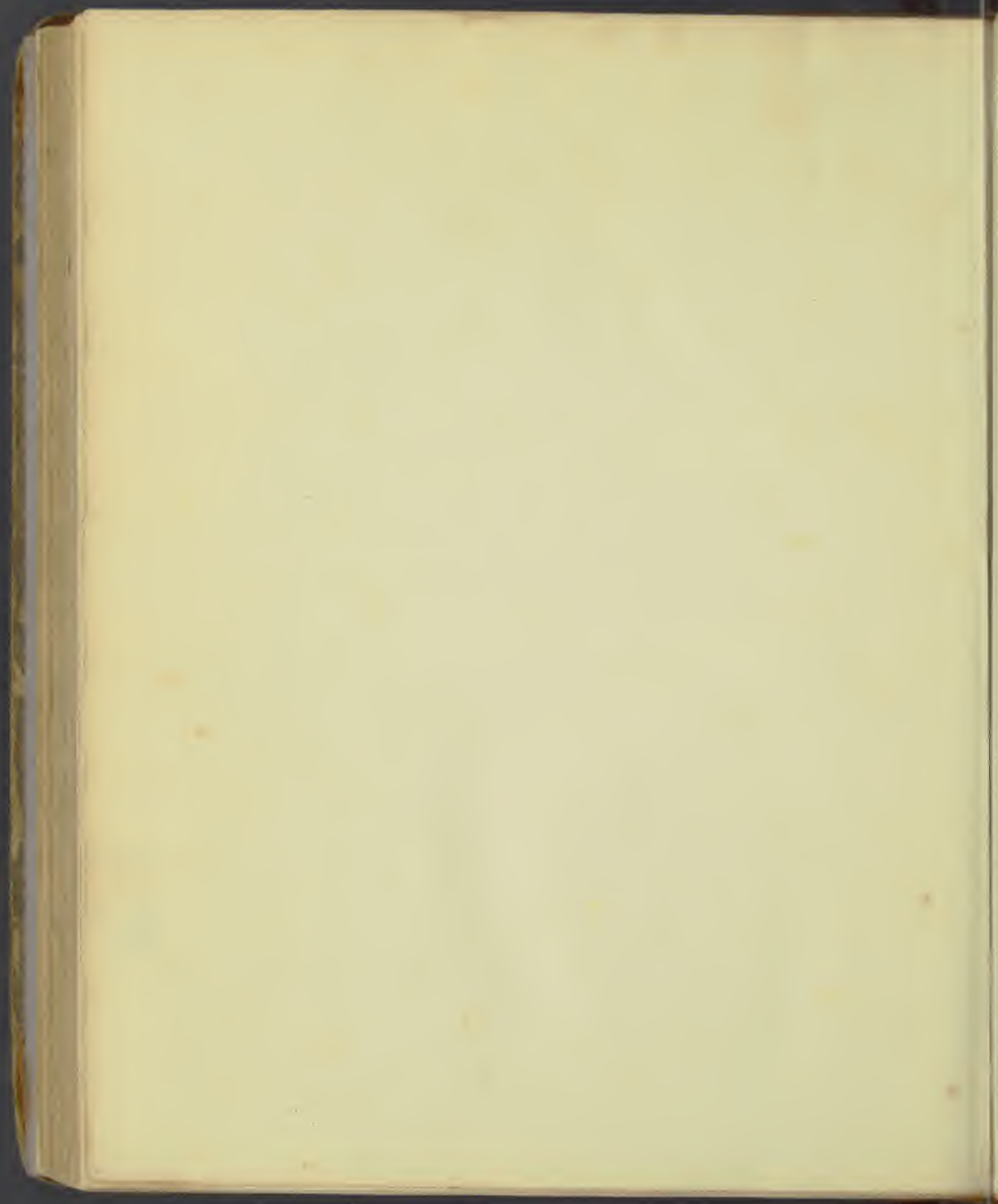


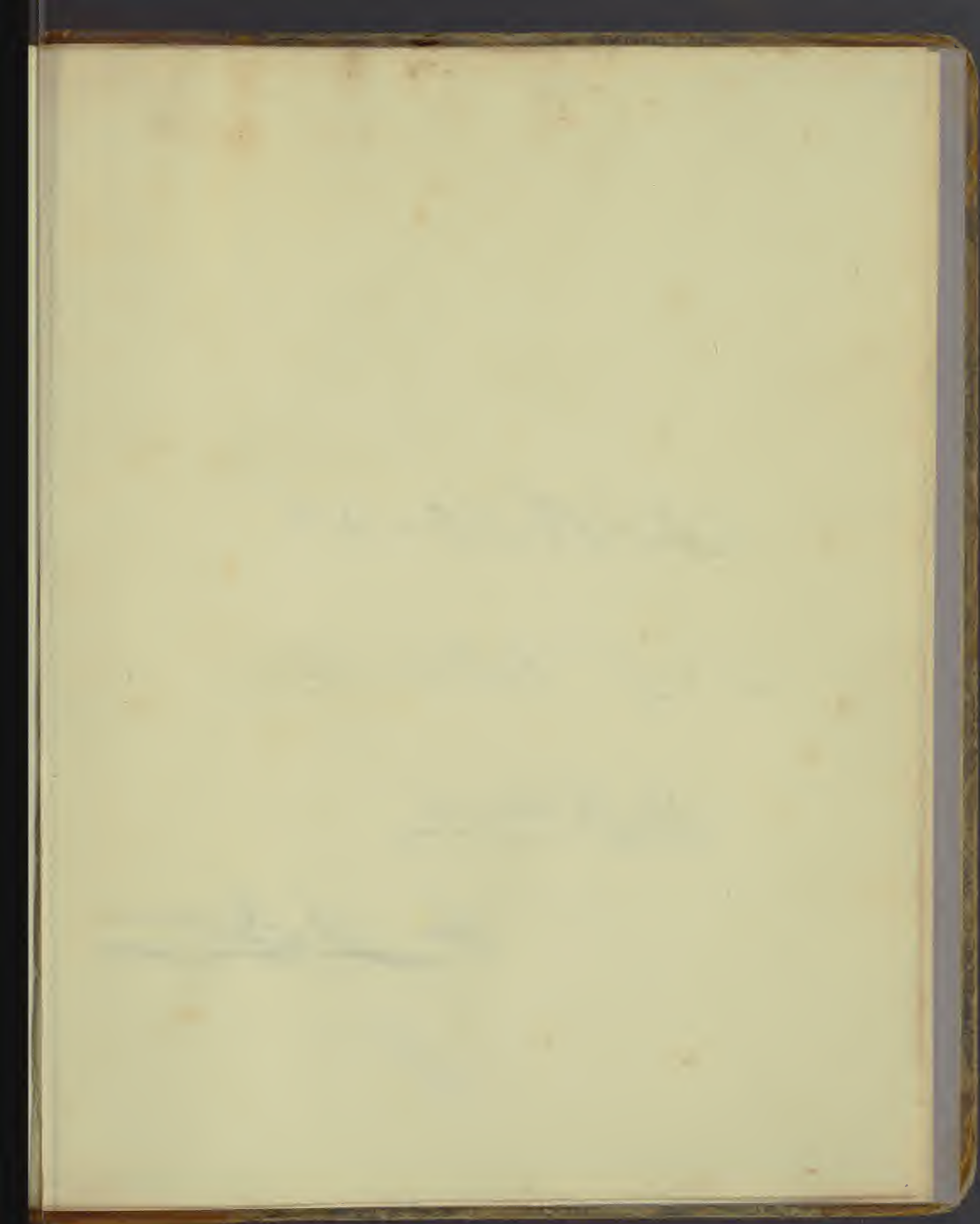










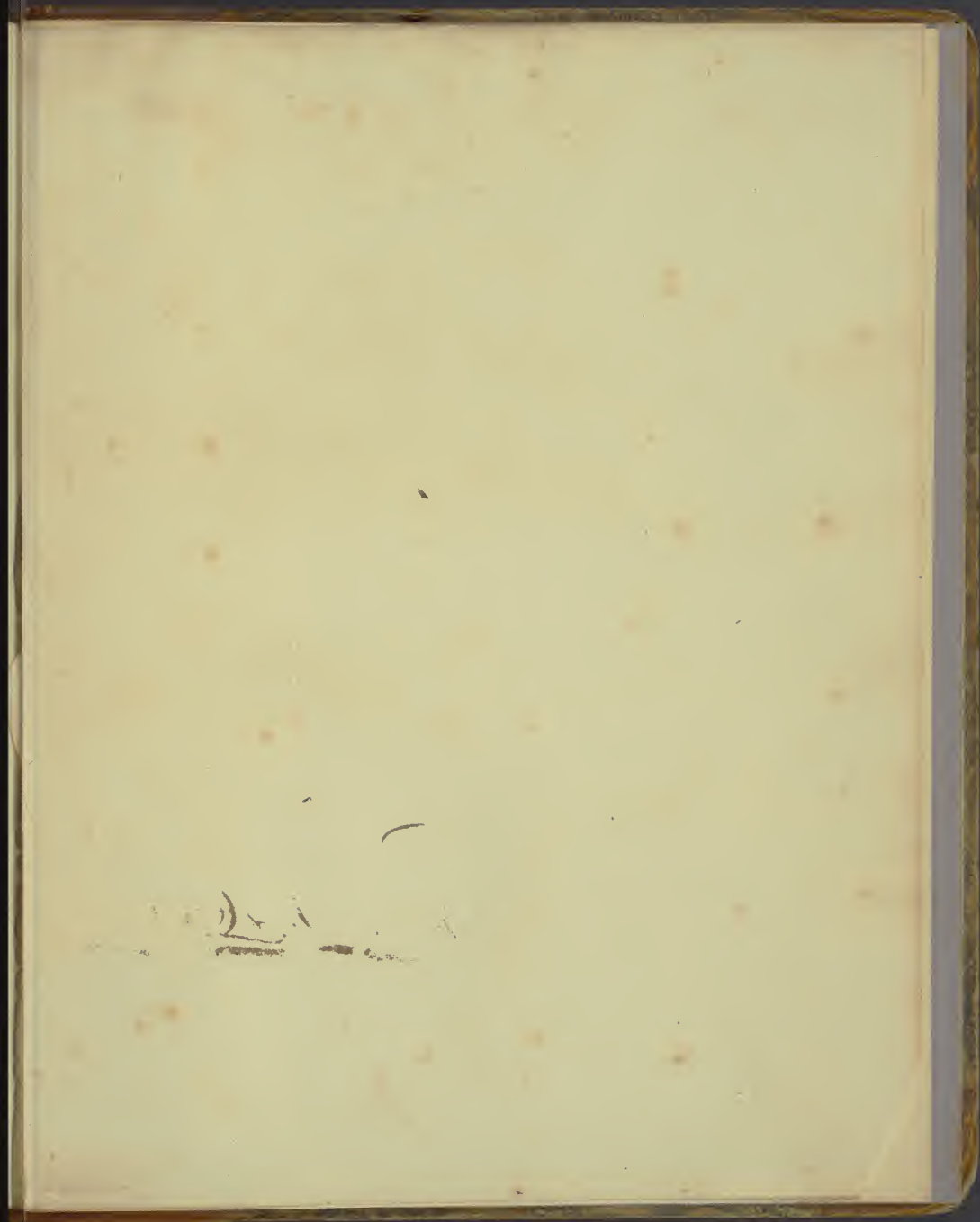


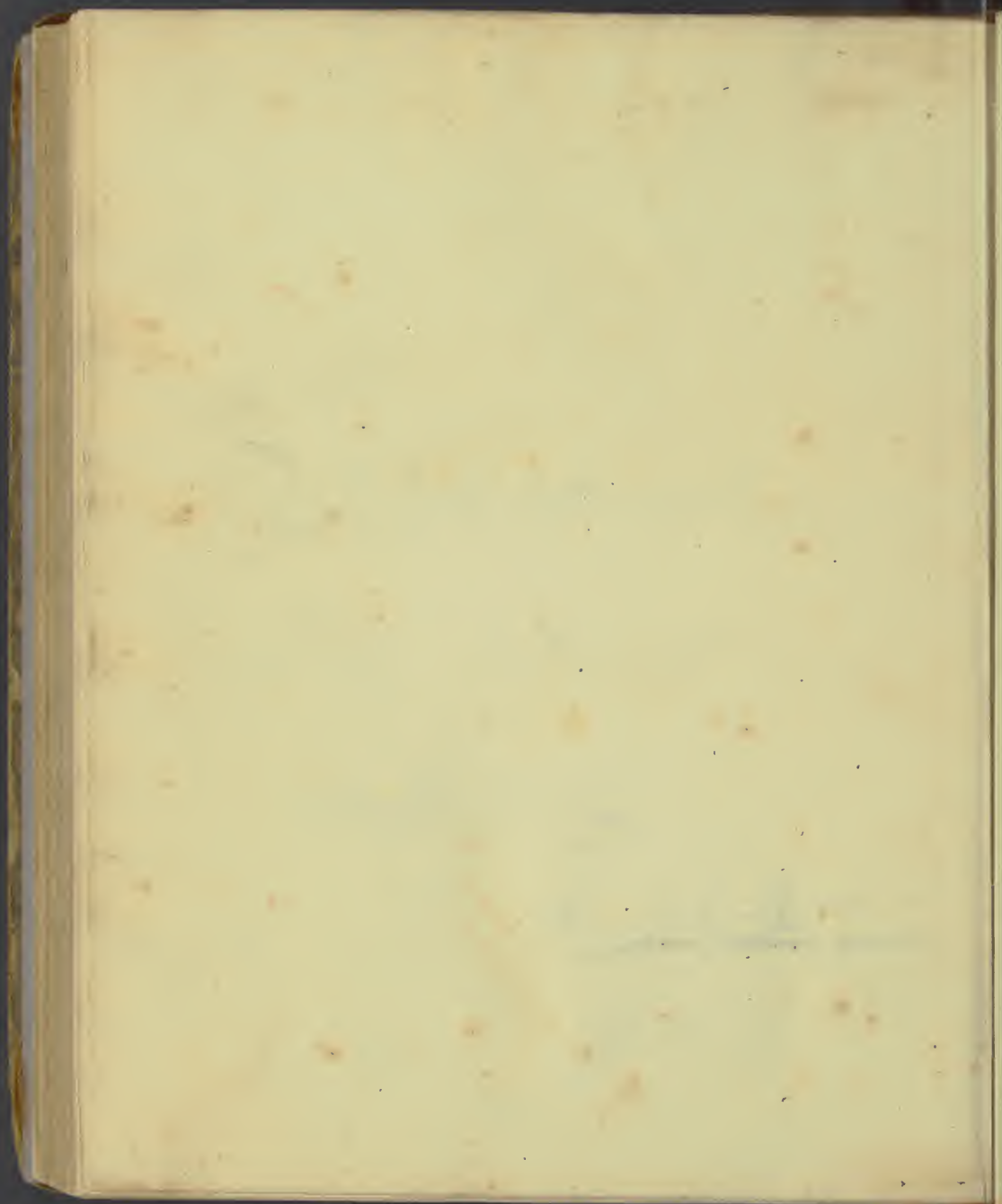
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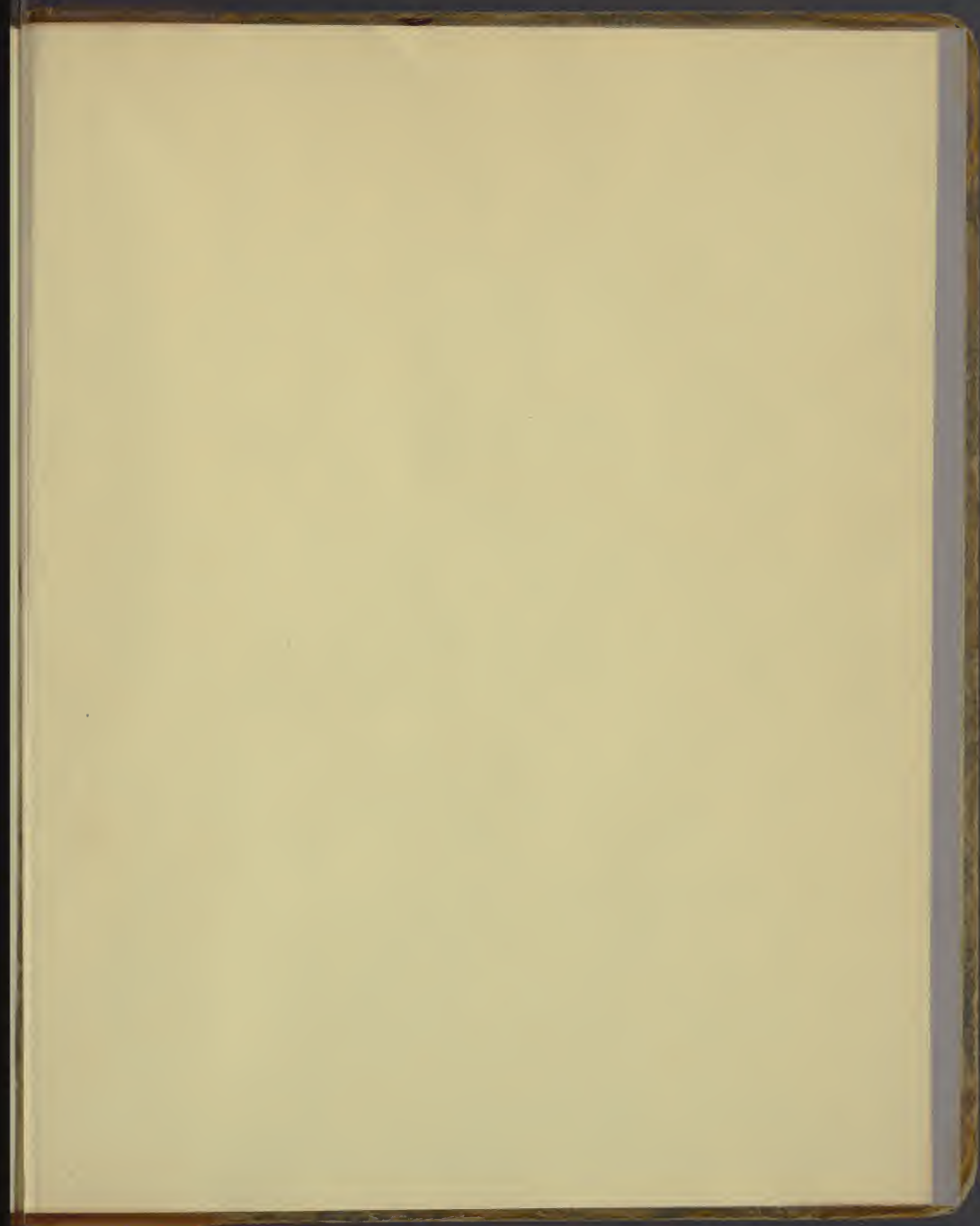
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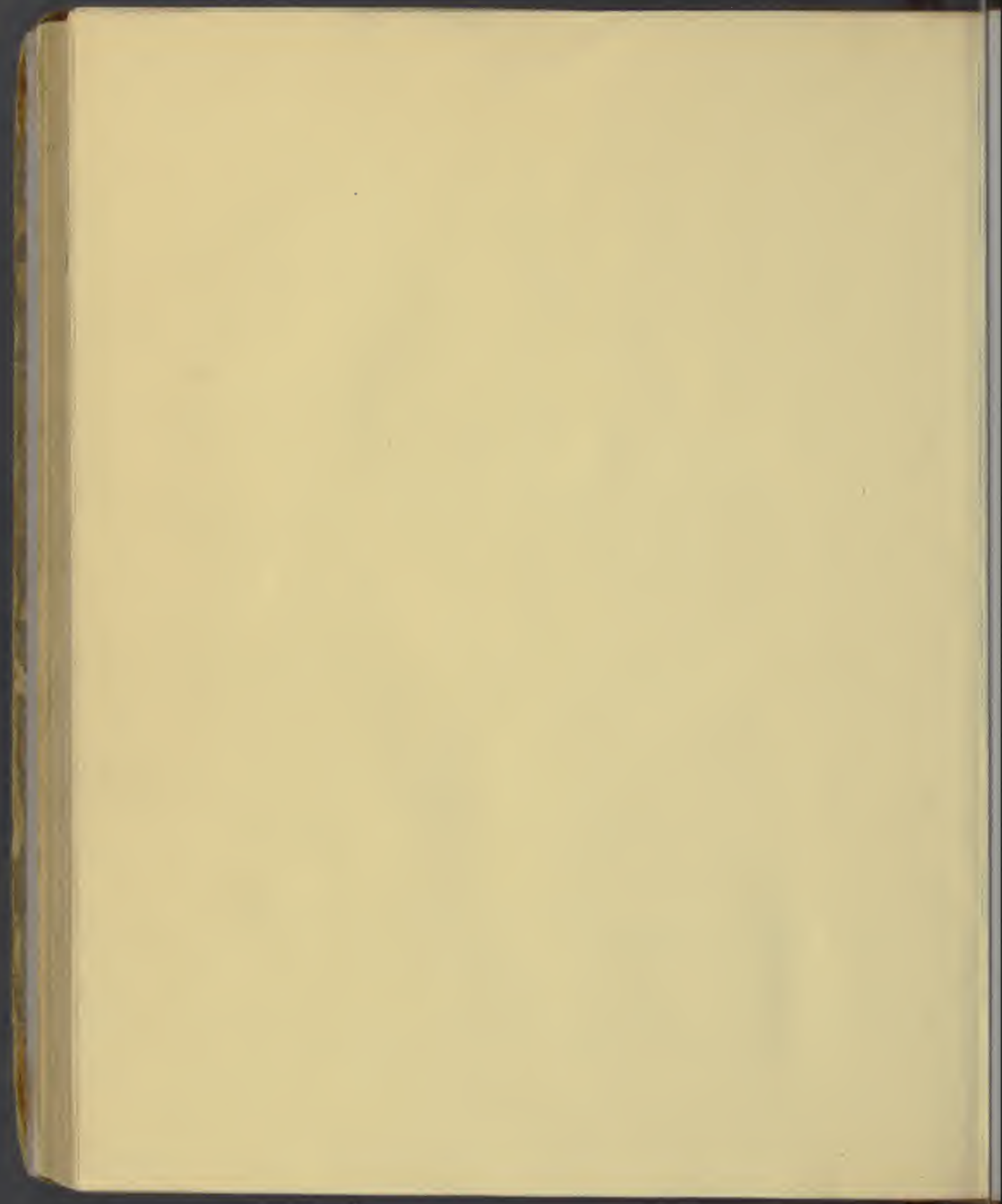
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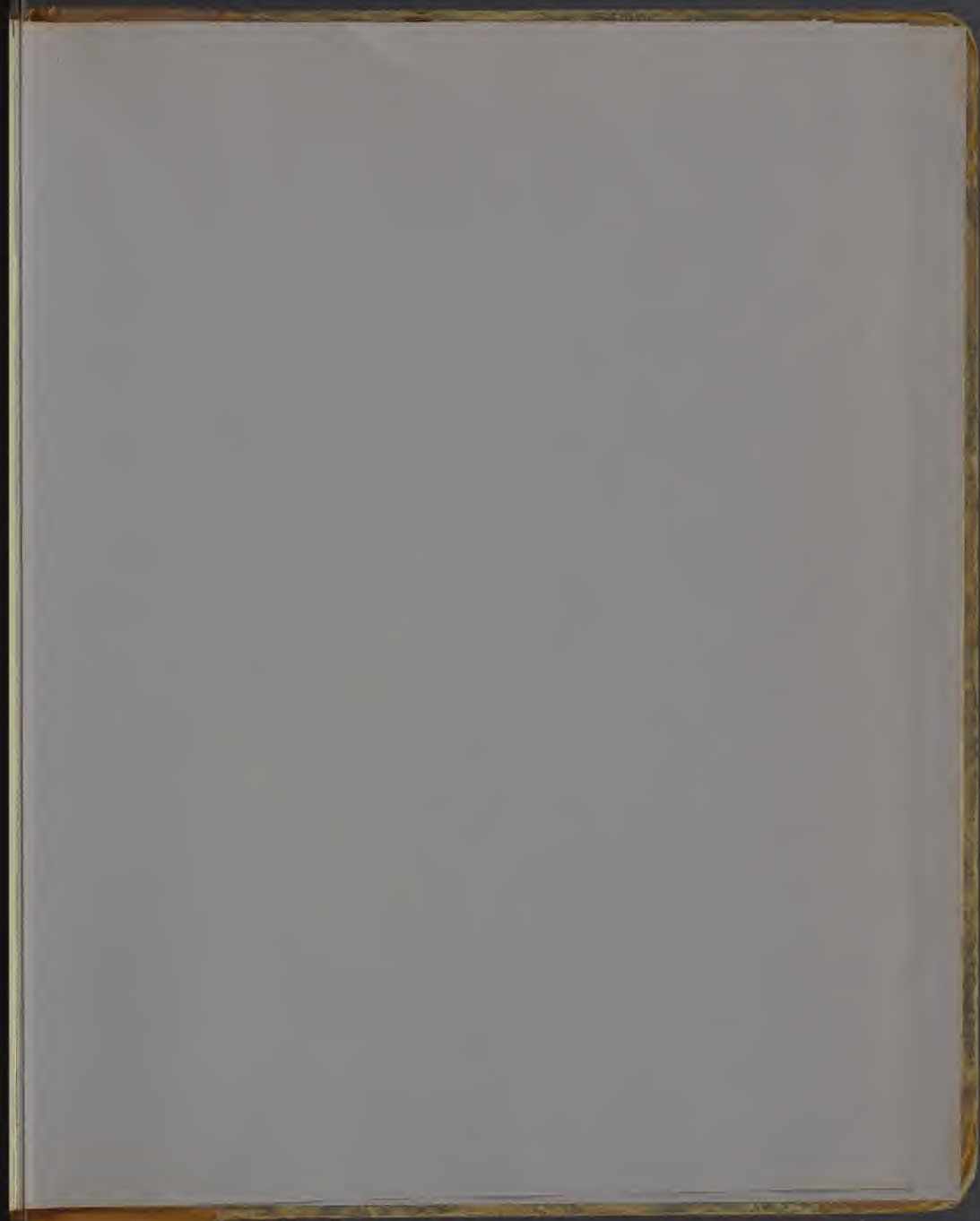
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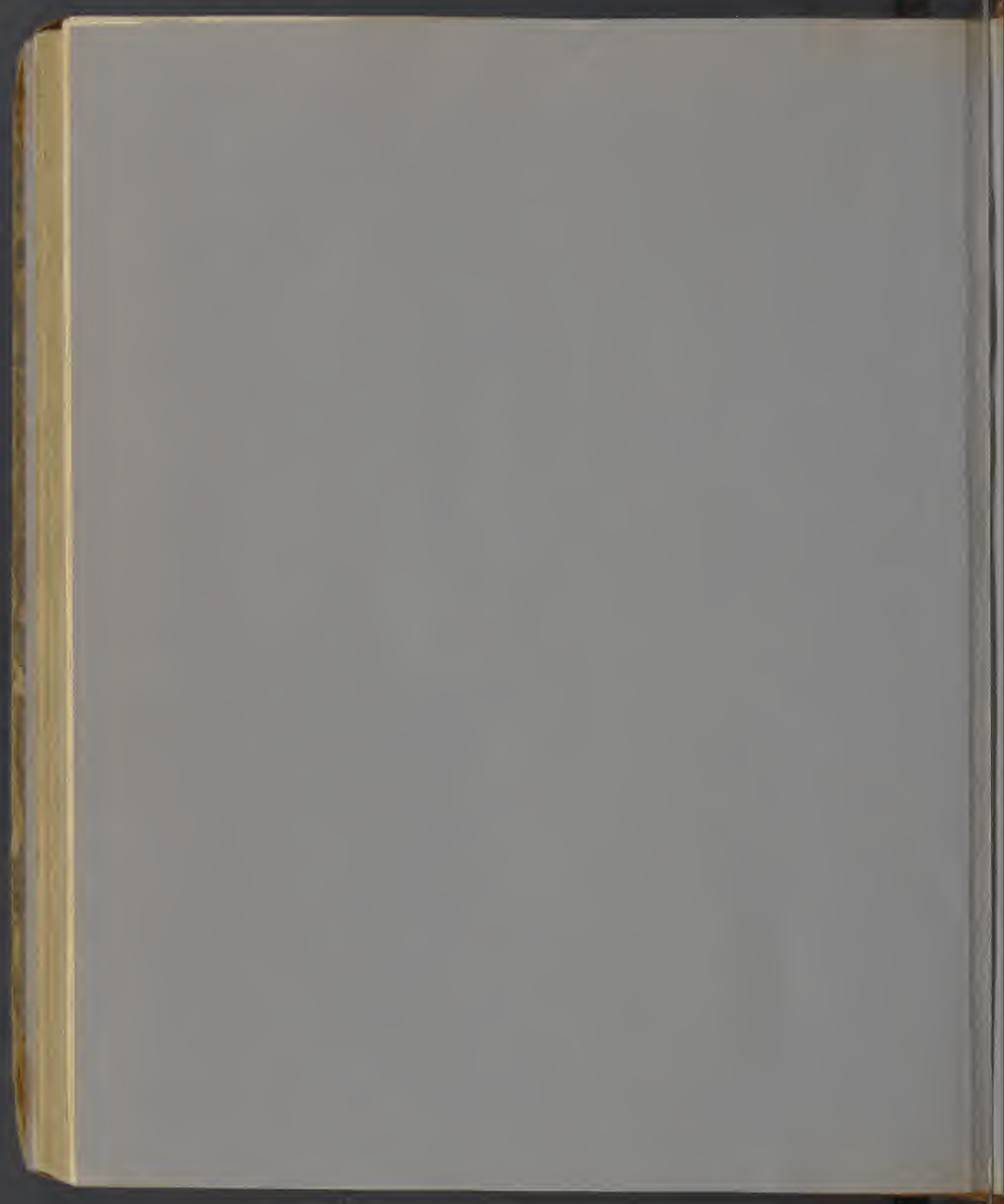


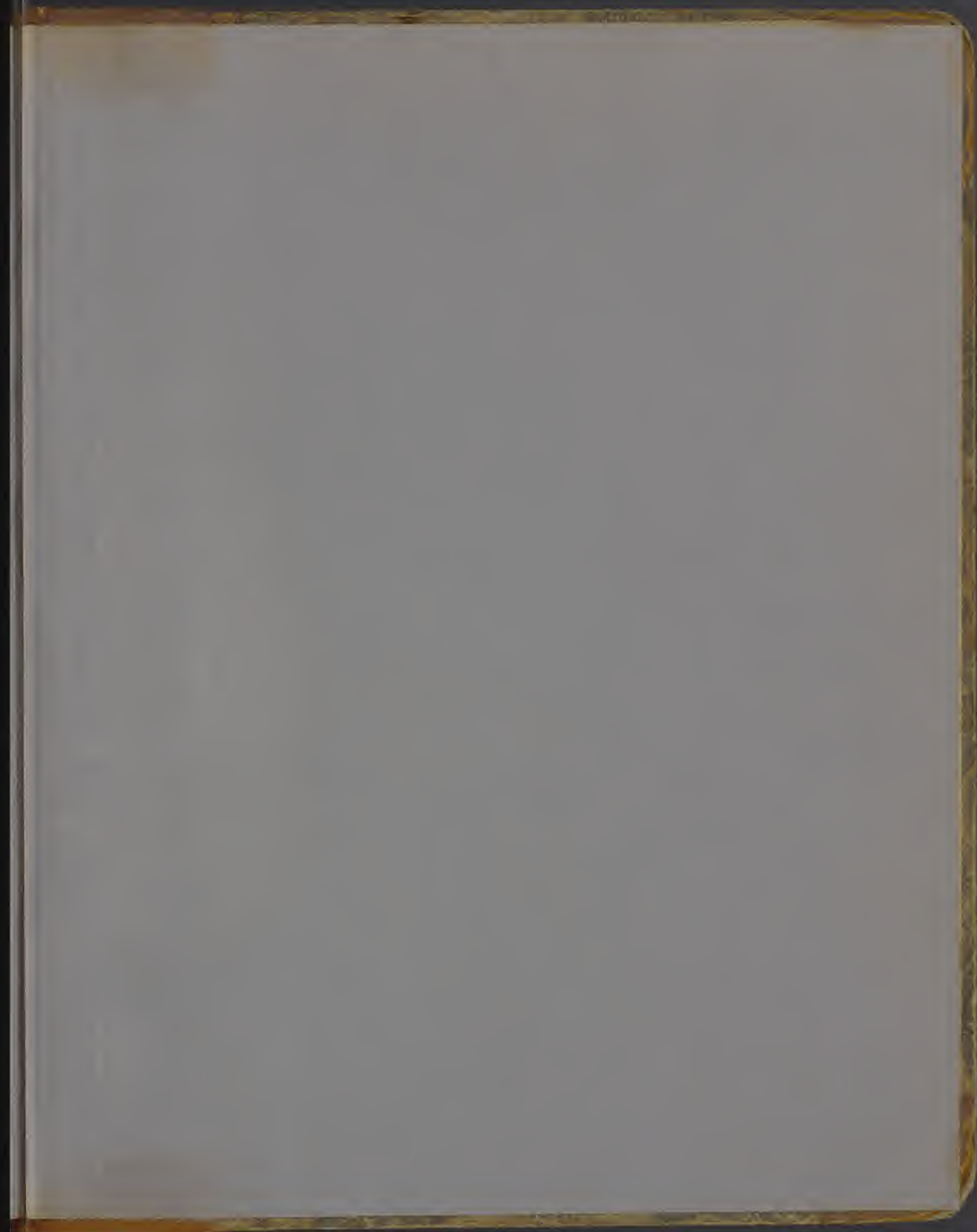


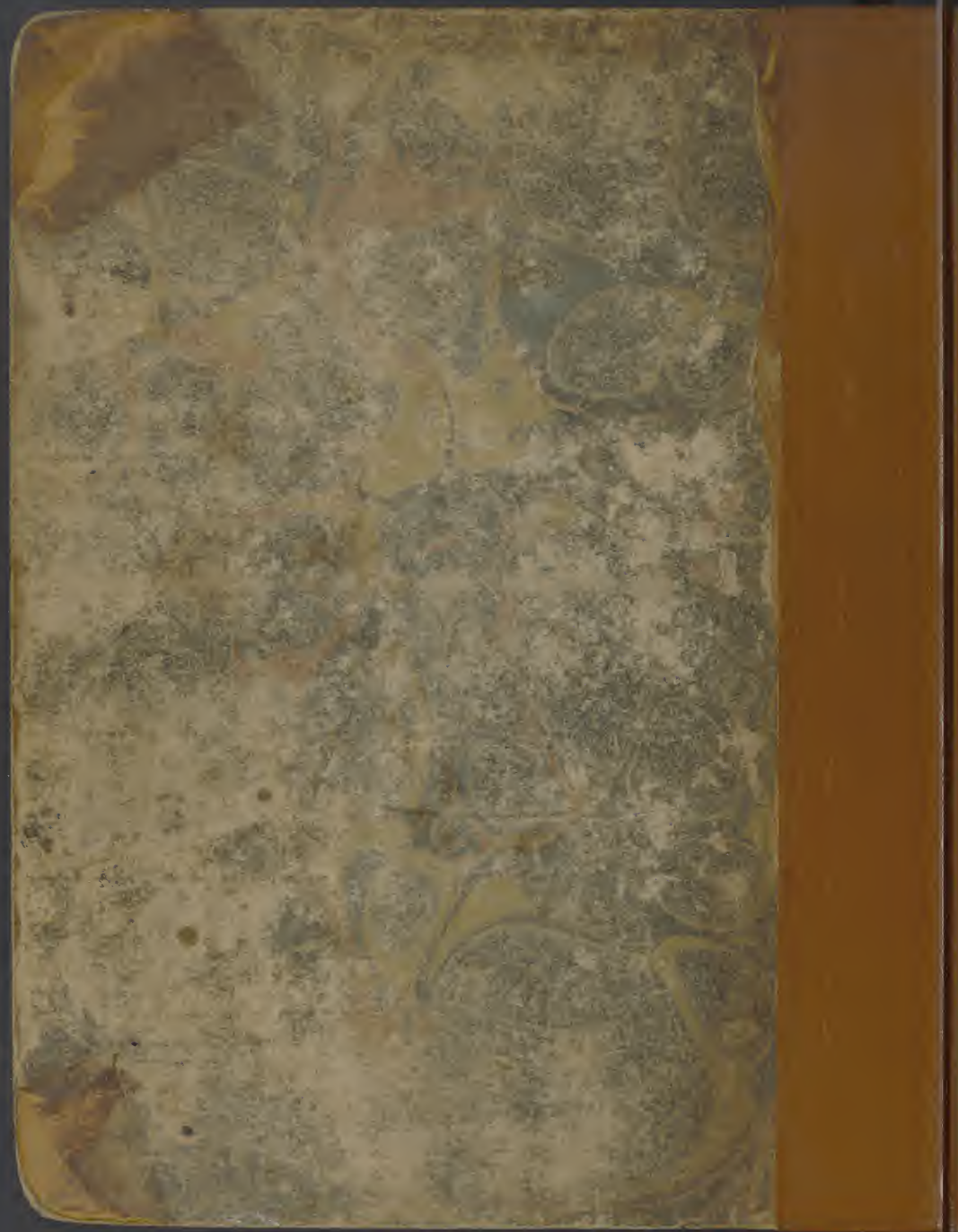












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